

**THE BACKGROUND, JURISDICTIONAL BASIS AND THE PROCEDURAL  
AND EVIDENTIAL FAIRNESS OF THE TRIAL OF GERMAN MAJOR WAR  
CRIMINALS, NUREMBERG, 1945-1946.**

by

*Mervyn George*

**M.G. EVERETT Q.C.**

**in the Faculty of Law**

**Submitted in fulfilment of the requirements  
for the degree of  
Doctor of Philosophy  
University of Tasmania  
March 1990**

## STATEMENT

To the very best of my knowledge this thesis contains no material which has been accepted for the award of any other higher degree of graduate diploma in any tertiary institution and that, to the best of my knowledge and belief, the thesis contains no material previously published or written by another person, except when due reference is made in the text of the thesis.

I make this statement on behalf of the deceased candidate.

-----  
Dr. S. Blay  
Supervisor

### Acknowledgement

Mr M. Everett Q.C. formerly a Justice of the Supreme Court of Tasmania and of the Federal Court of Australia died in 1988. The candidate completed the thesis but had not presented it.

The Department of Law prepared the final copy of this thesis and the tables of cases and statutes. The Department also organised the proof reading of the text.

The thesis was the sole work of the candidate.

## THESIS CHAPTERS

### TABLE OF CONTENTS

| Chapter  | Page Number |
|--|-------------|
| <b>1. Introduction.....</b>  | <b>1</b>    |
| -The Orthodox Moralist and Pragmatic View.....   | 1           |
| -Were New Penal Laws Created by the Victors?.....  | 2           |
| <b>2. Outlines of the Development of the Laws and Customs of War in Four Eras.....</b>   | <b>6</b>    |
| -Introduction .....  | 6           |
| <u>The Period to the First World War .....</u>   | 6           |
| <u>The Period Immediately following the First World War .....</u>  | 7           |
| -The Paris Peace Conference .....  | 7           |
| -The Advisory Committee of Jurists .....   | 9           |
| -The Peace Treaties of 1919-23 .....   | 11          |
| -Peace Treaties With Turkey .....  | 12          |
| -The Leipzig Trials .....  | 13          |
| -Kaiser Wilhelm II .....   | 14          |
| <u>The Period Between the Two World Wars up to 3 September 1939 .....</u>  | 15          |
| -The Covenant of the League of Nations .....   | 15          |
| -The Draft Treaty of Mutual Assistance and the Unratified Geneva Protocol, 1924.....   | 16          |
| -The Locarno Treaties.....   | 16          |
| -General Act for the Pacific Settlement of International Disputes, 1928 .....  | 17          |
| -The Italo-Abyssinian War.....   | 17          |
| -The Japanese Occupation of Manchuria and the Sino-Japanese War.....   | 18          |
| -Proposals of Specialist Bodies.....   | 18          |
| The International Congress of Penal Law.....   | 19          |
| The Convention for the Creation of an International Criminal Court.....  | 19          |
| <u>The Period During the Second World War and Immediately Thereafter.....</u>  | 20          |
| -The London International Assembly.....  | 20          |
| -The International Commission for Penal Reconstruction and Development.....  | 21          |
| -The United Nations War crimes Commission .....  | 22          |
| -Conclusions.....  | 27          |
| <b>3. The Relationship Between the Nuremberg Indictment and the elaboration of National Socialist Doctrines in 'Mein Kampf' and other German Writings.....</b> | <b>33</b>   |
| -Introduction.....   | 33          |
| -The Disclosures in 'Mein Kampf' .....   | 34          |
| -Further Public Declarations of Nazi Procedures.....   | 36          |
| -The Fuhrer Principle.....   | 37          |
| -The Judgment of the International Military Tribunal.....  | 39          |
| -Conclusion.....   | 40          |
| Annexe to Chapter 3 .....  | 43          |
| <b>4. Warnings to Axis Powers.....</b>   | <b>45</b>   |
| -Introduction.....   | 45          |
| -Initial Public Statements of Condemnation .....   | 45          |
| -Debate in the House of Lords and the Simultaneous Declaration of President Roosevelt, 7 October, 1942 .....   | 48          |
| -Statement by Mr Eden in the House of Commons, 17 December 1942.....   | 49          |
| -The United Kingdom Declaration, 30 August 1943 .....  | 49          |
| -The Moscow Declaration, 30 October 1943.....  | 50          |
| -Statement by the American President, 30 July 1943.....  | 50          |
| -Conclusion.....   | 51          |
| Appendix 1 .....   | 54          |
| <b>5. The Significance of the United Nations War Crimes Commission in the Development of 'Nuremberg Law'.....</b>  | <b>55</b>   |
| -Introduction.....   | 55          |
| Consideration of the Early Records of the Commission .....   | 55          |



|   |            |
|---|------------|
| -The Advent to Lord Wright as Chairman of the Commission .....  | 60         |
| -The Period Following the Collapse of the Third Reich .....   | 61         |
| -The Work of the Commission after the signing of the London Agreement and Charter.....                                | 63         |
| -Commentary on the Commission's Work.....   | 64         |
| Appendix 1 .....  | 70         |
| <b>6. The Birth of 'Nuremberg Law' .....</b>  | <b>71</b>  |
| -Introduction.....  | 71         |
| -The Period from 21 August 1944 to 11 November 1944 .....   | 71         |
| -The Period from November 1944 to 12 April 1945 .....   | 75         |
| -The Period from 12 April 1945 to 8 August 1945 .....   | 80         |
| -The Law as propounded by American Prosecutors in June 1945 (as Documented).....                                      | 82         |
| -'Illegal Launching'.....   | 82         |
| -Conclusion .....   | 84         |
| <b>7. Analysis of the London Agreement and the Charter of the International Military Tribunal, 8 August 1945.....</b> | <b>87</b>  |
| <b>8. The Nuremberg Indictment.....</b>   | <b>94</b>  |
| -Introduction .....   | 94         |
| -General Perspective on the indictment.....   | 94         |
| -Count 1- The Common Plan or Conspiracy.....  | 95         |
| -Count 2-Crimes Against Peace.....  | 100        |
| -Count 3-War Crimes.....  | 101        |
| -Count 4-Crimes Against Humanity.....   | 103        |
| -Conclusions .....  | 105        |
| <b>9. The Indicted Organisations.....</b>   | <b>110</b> |
| Annexe to chapter 9 .....   | 116        |
| <b>10. The Procedural and Evidential Fairness of the Nuremberg Trial.....</b>   | <b>118</b> |
| -Introduction.....  | 118        |
| -Matters Affecting Individual defendants.....   | 119        |
| -Gustav Krupp von Bohlen and Halbach.....   | 119        |
| -Martin Bormann .....   | 120        |
| -Ernst Kaltenbrunner.....   | 121        |
| -Streicher .....  | 123        |
| -Hess 23a .....   | 123        |
| -Rules of Procedure .....   | 125        |
| -The Presidents Opening Statement .....   | 126        |
| -The Presentation of Evidence by the Prosecution .....  | 126        |
| -Affidavit Evidence.....  | 129        |
| -Our Special Rulings .....  | 129        |
| -Evidence Tendered in the Form of Film.....   | 130        |
| -The tendering in Evidence of Parts only In Documents.....  | 131        |
| -The Case Against the 'Indicted' Organisations.....   | 132        |
| -The Breadth of Documentary Evidence.....   | 133        |
| -The Alleged Intrusion of the Vatican.....  | 134        |
| -Did the Tribunal Members Keep Open Minds? .....  | 134        |
| -'Speeches by Prosecution Counsel'.....   | 135        |
| -The Tribunal and the press .....   | 137        |
| References to Written Notes.....  | 137        |
| -Witnesses for Documents Tendered By Defendants.....  | 138        |
| -Conclusion .....   | 138        |
| Annexe 1.....   | 145        |
| Annexe 2.....   | 148        |
| Appendix 1.....   | 149        |
| <b>11 The Nuremberg Judgment; An Analysis.....</b>  | <b>166</b> |
| -Introduction: Structure of the Judgment .....  | 166        |
| -Violations of International Treaties .....   | 166        |
| -The Law of Charter.....  | 167        |
| -The Views of Prominent Authors, Jurists and the United Nations Organisation.....                                     | 170        |
| -The Law as to the Common Plan or Conspiracy .....  | 177        |

|  |     |
|--|-----|
| -The Law Relating to War Crimes.....   | 179 |
| -The Law as to Crimes Against Humanity.....  | 180 |
| -The Law relating to the Groups and Organisations Named as Criminal.....   | 182 |
| -The Findings in Respect of Individual Accused.....  | 182 |
| <br>12 The Defence of Superior Orders.....   | 188 |
| -Introduction.....   | 188 |
| -Conflicting Doctrines:Suggested Solutions.....  | 189 |
| -The Doctrine of respondeat superior.....  | 189 |
| -The Theory of Absolute Liability.....   | 189 |
| -The 'Manifest Illegality Principle'.....  | 190 |
| -Some Judicial Consideration of the 'Manifest Illegality' Principle.....   | 190 |
| -The mens rea Principle.....   | 194 |
| -The Barren Years: 1919-1945.....  | 198 |
| -The Dawn Before the London Agreement and Charter.....   | 198 |
| -The Nuremberg Judgment.....   | 199 |
| -The Tokyo Tribunal.....   | 201 |
| -The Cases of Eichmann and Calley.....   | 202 |
| -Adolf Eichmann.....   | 203 |
| -Lieutenant William L. Calley.....   | 203 |
| -The Curious case of the 'American Instructions'.....  | 204 |
| -Conclusion.....   | 205 |
| <br>13 Proceedings at Nuremberg Subsequent to the Principal Trial: 1946-1949.....  | 213 |
| -The Establishment of Jurisdiction.....  | 213 |
| -The Trials in the 'Subsequent Proceedings'.....   | 217 |
| -The 'Medical Case' (Case No. 1).....  | 217 |
| -The 'Milch Case' (Case No.2).....   | 219 |
| -The 'Altstoetter Case' (Case No. 3).....  | 220 |
| -The 'Pohl Case' (Case No. 4).....   | 222 |
| -The 'Flick Case' (Case No. 5).....  | 223 |
| -The 'I.G. Farben Case' (Case No. 6).....  | 225 |
| -The 'Hostage Case' (Case No. 7).....  | 227 |
| -The 'RuSHA Case' (Case No. 8).....  | 229 |
| -The 'Einsatzgruppen Case' (Case No. 9).....   | 230 |
| -The 'Krupp Case' (Case No. 10).....   | 231 |
| -The 'Ministries Case' (Case No. 11).....  | 231 |
| -The 'High Command Case' (Case No. 12).....  | 233 |
| -The Legal Significance of the Subsequent Proceedings.....   | 234 |
| -Conclusion.....   | 235 |
| Annexel.....   | 240 |
| Annexe 2.....  | 243 |
| Annexe 3.....  | 247 |
| Annexe 4.....  | 250 |
| <br>14 The Australian Road to the International Military Tribunal for the Far East: Comparison<br>Between 'Nuremberg Law' and 'Tokyo Law'..... | 253 |
| -Introduction.....   | 253 |
| -Initial Australian Steps Towards the Trials of Japanese.....  | 253 |
| -The Establishment of the Tokyo Tribunal.....  | 255 |
| -The Charter of the Tokyo Tribunal.....  | 257 |
| -The Tokyo Trials in Brief Retrospect.....   | 258 |
| -The Place of the Tokyo Tribunal in International Criminal Law.....  | 259 |
| -Australian Perceptions Relating to the Treatment of Japanese War Criminals.....   | 261 |
| -Australian Government Policies and Actions.....   | 261 |
| -The War Crimes Act 1945.....  | 262 |
| -Other Post-War Legislation.....   | 263 |
| -Criticism of the Tokyo Trial.....   | 263 |
| Appendix I.....  | 271 |
| Appendix II.....   | 272 |
| Appendix III.....  | 278 |
| Appendix IV.....   | 279 |

|           |  |            |
|-----------|--|------------|
| <b>15</b> | <b>The Application of 'Nuremberg Law' from the 1940's to the Present Time.....</b>                                       | <b>280</b> |
|           | -Introduction.....   | 280        |
|           | -National Legislation and Trials.....  | 280        |
|           | -Armistice Agreements and Peace Treaties.....  | 282        |
|           | -The Prosecution of Nazi Crimes By German Legal Authorities in the Federal Republic of Germany<br>from 1945 Onwards..... | 282        |
|           | -Trials by Courts in the German Democratic Republic and East Berlin.....   | 284        |
|           | -The Trial by Israel Courts of Adolf Eichmann.....   | 285        |
|           | -The Trial of First Lieutenant Calley.....   | 286        |
|           | -Conclusion .....  | 287        |
| <b>16</b> | <b>Post Nuremberg: The United Nations Organisation.....</b>  | <b>292</b> |
|           | -Introduction.....   | 292        |
|           | -Initial Steps of the United Nations Organisation.....   | 292        |
|           | -The Legal Status of the U.N.O. General Assembly Resolutions .....   | 293        |
|           | -The definition of Aggression; An Analysis .....   | 293        |
|           | -Draft Code of Offences Against the Peace and Security of Mankind.....   | 295        |
|           | -The views and Works of Scholars and Writers.....  | 296        |
|           | -Professor Bassiouni.....  | 296        |
|           | -Mr Benjamin B. Ferencz.....   | 296        |
|           | -Professor Brownlie.....   | 297        |
|           | -Professor Stone .....   | 297        |
|           | -Professor Woetzel .....   | 298        |
|           | -A British Political View.....   | 298        |
|           | -Dr C.A. Pompe .....   | 298        |
|           | -Conclusion .....  | 299        |
|           | Appendix I.....  | 305        |
| <b>17</b> | <b>The Concurrence and the Dissent.....</b>  | <b>308</b> |
|           | -Introduction.....   | 308        |
|           | -Section A- The Concurrence .....  | 308        |
|           | -Oppenheim's International Law (7th edn., ed. Lauterpacht).....  | 308        |
|           | -Lord Wright.....  | 309        |
|           | -Mr Henry L. Stimson.....  | 310        |
|           | -Academic Views.....   | 311        |
|           | -Section B- The Dissent .....  | 318        |
|           | -German Views of 'Nuremberg Law'.....  | 318        |
|           | -Basic Submission on Behalf of all German Defence Counsel .....  | 319        |
|           | -Submission by Dr. Hermann Jahrreiss.....  | 319        |
|           | -Address by Dr. Ehard to German Lawyers .....  | 320        |
|           | -View of Jurists and Scholars.....   | 321        |
|           | -Conclusion .....  | 327        |
|           | Appendix I.....  | 334        |
| <b>18</b> | <b>Conclusions on the Nuremberg Process.....</b>   | <b>337</b> |
|           | -Introduction.....   | 337        |
|           | -The Sources of International Law .....  | 338        |
|           | -The Legal Status of Germany after its Unconditional surrender on 8 May 1945 .....                                       | 340        |
|           | -The Analogy of the Development of the Common Law .....  | 351        |
|           | -Conclusion on the Validity of 'Nuremberg Law' .....   | 355        |
|           | -The Character and Composition of the Nuremberg Tribunal.....  | 358        |
|           | -The Legal Effect of the Pact of Paris.....  | 360        |
|           | -'nullum crimen sine lege' and 'ex post facto'.....  | 363        |
|           | -The Acts of State Doctrine: Individuals as the Subject of International Law .....                                       | 365        |
|           | -The United States case of <u>Ex Parte Quin</u> .....  | 367        |
|           | -Tu Quoque .....   | 368        |
|           | -Further Considerations of the Indictment.....   | 369        |

TABLE OF TREATIES

|      |  |
|------|--|
| 1887 | Extradition Treaty United States- Holland  |
| 1895 | Extradition Treaty France-Holland  |
| 1898 | Extradition Treaty Great Britain-Holland   |
| 1899 | Hague Convention concerning the Law and Customs of War on Land   |
| 1907 | Hague Conventions (outlined below)   |
|      | Hauge Convention for the Pacific Settlement of International Disputes  |
|      | Hague Conventions on War and Neutrality (Collectively)   |
|      | Hague Convention on the Conversion of Merchant ships into Warships   |
|      | Hague Convention on the Law and Customs of Warfare on Land   |
|      | Hague Conventions relative to the Opening of Hostilities   |
| 1919 | Covenant of the League of Nations  |
|      | Treaty of Saint-Germain (Treaty of Peace between the Allied and Associated powers and Austria)                                     |
|      | Treaty of Versailles (Treaty of Peace between the Allied and Associated Powers Germany)  |
| 1920 | Statute of the Permanent Court of International Justice  |
|      | Treaty of Sevres (Treaty of Peace between the Allied and Associated Powers and Turkey) [not ratified and did not become effective] |
| 1923 | Treaty of Mutual Assistance [draft only and unratified]  |
|      | Greece-Turkey, Convention of Laussane  |
| 1925 | Locarno Treaties, Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy                             |
| 1928 | General Act for the Pacific Settlement of International Disputes   |
|      | General Treaty for the Renunciation of War (Briand-Kellog Pact)(Pact of Paris)   |
| 1929 | Geneva Convention on the Treatment of Prisoners of War   |
| 1937 | Convention for the Creation of an International Criminal Court [not ratified]  |
| 1938 | Munich Agreement for the Cession of Czechoslovakia to Germany of Sudeten German Territory (Berlin Declaration).                    |
| 1943 | Draft Convention for the Creation of an International Court  |
|      | [not ratified]   |

- 1945 Charter of the United Nations
- Agreement for the Prosecution and Punishment of Major War Criminals (London Agreement), and Charter of the International Military Tribunal (Nuremberg Charter)
- Declaration regarding the Defeat of Germany and the Assumption of Supreme Authority with respect to Germany
- 1946 Charter of the International Tribunal for the Far East (Tokyo Tribunal)
- Appendix 11
- 1947 Peace Treaties
- Bulgaria
- Finland
- Hungary
- Italy
- Roumania
- Statute of the International Law Commission
- 1948 Genocide Convention
- 1951 Japanese Peace Treaty
- 1969 Vienna Convention on the Law of Treaties

To see things and their real significance one needs the correct distance. Too close, and one is struck only by the details, one does not see the forest for the trees. Too far away, and one may have a good view on the whole, but one misses the particulars and their impact on the direct surroundings; that impact has often more to do with details than with the general structure.

... we need an evaluation of the Nuremberg and Tokyo trials now that almost twenty five years have passed. We need an evaluation, because they stand in history as a fact. On the facts of the past, starting from history, we have to build the future.

At the time, participating in the Tokyo trial as one of the judges, the words of Macbeth alarmed me:

... that we but teach  
Bloody instructions, which being taught, return  
To plague the inventor: (Macbeth, Act I, Scene VII)

Are the 'bloody instructions', as formulated in the charters and executed in the judgments to plague us? Or to guide us? Will they be an asset, or a liability in the shaping of the future? Reappraisal of what happened in the postwar trials may contribute to the answers on that question.

(Judge Bert V.A. Roling, 'The Nuremberg and the Tokyo Trials in Retrospect', Bassiouni and Nanda, A Treatise on International Criminal Law, Vol. 1, pp. 590-591, Charles C. Thomas, Illinois, U.S.A., 1973).

## CHAPTER 1 INTRODUCTION

Ever since the signing of the agreement in London on 8 August 1945 by representatives of the British, French, American and Russian Governments ('London agreement'), followed by the presentation to the International Military Tribunal sitting at Berlin on 18 October 1945 of the indictment against twenty four of the most prominent German military and political leaders, and the proceedings at Nuremberg which culminated in the judgement delivered on 30 September and 1 October 1946, there has been widespread and persistent controversy among lawyers, academics, scholars, historians and others, who have found 'Nuremberg Law'<sup>1</sup> a fascinating research subject. The principal issue was, and remains, whether or not the trials conducted pursuant to the Charter annexed to the London Agreement had a sound jurisdictional basis.

For the most part the views publicly expressed by writers on the issue have been firm and diametrically opposed.

### The orthodox moralist and pragmatic view

Shortly after the sittings of the Tribunal began, Lord Wright, Chairman of the United Nations War Crimes Commission from January 1945 until its dissolution in March 1948, wrote:-

The Agreement [that is, the London Agreement includes as falling within the jurisdiction of the Tribunal persons who committed the following crimes: (a) crimes against peace, which means in effect planning, preparation, initiation or waging of a war of aggression; (b) war crimes, by which term is meant mainly violation of the laws and customs of war; (c) crimes against humanity, in particular murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population.

The Tribunal so established is described in the Agreement as an International Military Tribunal. Such an International Tribunal is intended to act under International Law. It is clearly to be a judicial tribunal constituted to apply and enforce the appropriate rules of International Law. I understand the Agreement to import that the three classes of persons which it specifies are war criminals, that the acts mentioned in classes (a), (b), and (c) are crimes for which there is properly individual responsibility; that they are not crimes because of the agreement of the four Governments

but that the Governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law. On any other assumption the Court would not be a Court of law but a manifestation of power. The principles which are declared in the Agreement are not laid down as an arbitrary direction to the Court but are intended to define and do, in my opinion, accurately define what is the existing International Law on these matters.<sup>2</sup>

The four prosecutors, in opening addresses and speeches at the close of the cases against the individual defendants and the indicted organisations, argued strongly that the indictment merely reflected existing recognised principles of international law.<sup>3</sup>

In its judgment, the Tribunal was unequivocally assertive. It said:

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction of the Tribunal, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal.

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defence, and will express its view on the matter.<sup>4</sup> [As discussed in Chapters 11 and 18, the sentence last cited was obiter].

It will be necessary to analyse the details of the indictment. It not only made provision for the trial of war crimes in the accepted sense of violations of the laws and customs of war (Count 3), crimes stricto sensu, but also for the prosecution of those alleged to have been responsible for 'the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes Against Peace, War Crimes, and Crimes against Humanity, as defined in the Charter of this Tribunal' (Count 1). Further, Count 2 of the indictment defined 'crime against peace' as participation 'in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances'. Finally, Count 4 alleged 'crimes against humanity', as defined in the Charter. A noteworthy feature of the indictment in a jurisprudential sense was the provision for the Tribunal to declare certain organisations 'criminal'. The consequence of such a declaration was starkly thus stated in Article 10 of the Charter:

In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.

Were new penal laws created by the victors?

The argument that the provisions of the Charter were contrary to accepted principles of international law was succinctly expressed in a motion adopted by all defence counsel at Nuremberg on 19 November 1945.<sup>5</sup> The Tribunal rejected the motion on 21 November 1945. The basis of its decision was that, insofar as the motion was a plea to the jurisdiction of the Tribunal, it was in conflict with Article 3 of the Charter. Defence counsel advanced three main arguments:

- (a) The relevant law was 'a new penal law ... enacted only after the crime'; as such it infringed the ex post facto principle.
- (b) 'Other principles of a penal character contained in the Charter are in contradiction with the maxim "Nulla Poena Sine Lege".
- (c) 'The judges have been appointed exclusively by States which were the one party in this war. This one party to the proceeding is all in one: creator of the statute of the Tribunal and of the rules of law, prosecutor and judge.'

It is proposed in this thesis to examine the validity of the divergent views which can be distilled from the mass of literature relating to 'Nuremberg Law'.<sup>6</sup> However, such an examination will only be preliminary to what, in the author's view, is a more purposeful objective: that is, the evaluation of 'Nuremberg Law' from the viewpoint of a trial lawyer rather than against a background of academic polemics. It is by using the forensic methods of a trial

lawyer that attention may be most meaningfully focussed on what should be the primary task of a criminal advocate, whether for the prosecution or the defence. That task is the minute examination and analysis of the basic trial documents: in the case of Nuremberg, the London Agreement, the Charter of the Tribunal and the indictment.

It will be submitted that much of the literature, whether it expresses concurring or dissenting views with respect to the validity of 'Nuremberg Law', places too much emphasis on the judgment of the Tribunal and not enough on the three basic documents. The London Agreement and Charter were a code which prescribed provisions designed to ensure, so far as it was practicable to do so, a fair trial, before the world, of German major war criminals, following the virtually undisputed acts of atrocity and inhumanity of a dimension never previously experienced. The International Military Tribunal went beyond the constituent documents and propounded a number of obiter propositions. Thereby the Tribunal itself sparked much of the controversy which the trial engendered.

A further object of the study is to demonstrate that many of the critics of 'Nuremberg Law' ignored the facts that the German Reich had surrendered unconditionally to the major Allied Powers and that, in reaching agreement on the terms of the London Agreement and Charter, they were exercising sovereign legislative authority, analogous to that of the Parliament of the state of Israel when it enacted the Nazis and Nazi Collaborators (Punishment) Law of 1950.

The study also includes, in as much detail as is practicable, an assessment of the procedural and evidential fairness of the Nuremberg trial. The object of such an evaluation is to demonstrate, from the perspective of a trial lawyer, that in such an emotive criminal trial as that at Nuremberg, courtroom 'atmosphere' and rulings on questions of evidence and procedure were more fundamental in ensuring a fair trial than dogmatic assertions concerning legal principles, such as the ex post facto doctrine and the maxim of nullum crimen nulla poena sine lege. The basic fact will always remain that the London Agreement and Charter were paramount and binding.

The chapters of the dissertation have been arranged, in chronological order, commencing with a very brief sketch in Chapter 2 of the development of the laws and customs of war in four eras, up to the period between the declaration of war on 3 September 1939 and the complete disintegration and surrender of the Third Reich on 8 May 1945.

In Chapter 5 the view is expressed that the activities of the United Nations War Crimes Commission were not as significant as Lord Wright asserted and that the Nuremberg trial would have proceeded substantially as it did even if the Commission had never existed.

Although the content of Chapter 6 is historical rather than legal, it is considered essential to appreciate the political and bureaucratic attitudes which ultimately found expression in the London Agreement and Charter; the more so because such attitudes are illuminated by documents which have only comparatively recently been declassified and made available for public scrutiny. It is demonstrated in Chapter 6 that American policies dominated the discussions which culminated in the London Agreement and Charter and found expression in the indictment, which was permeated by the peculiarly Anglo-American concept of criminal conspiracy.

Chapters 7, 8 and 9 are essentially analyses, by a trial lawyer, of the basic documents, particularly the indictment (Chapter 8), the scope and content of which dictated to a large degree the admissibility of evidence and made an unduly long trial inevitable.

In Chapter 12, a fundamental basis of the defence - the existence of superior orders - is examined as a separate issue. The conclusion is reached that the specific provision in the London Charter whereby that defence was not available, except in relation to the mitigation of punishment, was legally proper (Article 8).

The purpose of the discussion in Chapter 13 of the 'Subsequent Proceedings', as they were commonly designated, before American Tribunals at Nuremberg is to provide the background for demonstrating the different conclusions by some of the Tribunals, compared with the International Military Tribunal, on a number of the fundamental legal issues, in particular the charging of the crime of conspiracy together with charges of substantive offences which were the subject of the alleged conspiracy.

Chapter 14 traces the developments in Australia which preceded the establishment of the International Military Tribunal for the Far East ('Tokyo Tribunal'). The discussion in that chapter is directed at establishing that,



contrary to many views which have been expressed, including that of the Tokyo Tribunal itself, there were basic differences in the manner in which the Nuremberg and Tokyo Tribunals were established and in the provisions of the respective charters.

It is in Chapter 18 that the author crystalises his conclusions on the Nuremberg process in a discussion of the most important issues. The basis for such a discussion is laid in preceeding chapters. The thesis stated in that chapter is that the Nuremberg principal trial process was justified on legal grounds, and was also an expression of world conscience and overwhelming norms of morality. Above all, the process was generally fair and just. None of those sentenced to death at Nuremberg could have expected any more lenient treatment. Their realisation of their fate was attested by the fact that three of those who did not face trial at Nuremberg--Hitler, Goebbels and Ley--chose the alternative of suicide.

The view is also expressed in Chapter 18 that many of those who have dissented from the validity of 'Nuremberg Law' failed to appreciate the reality of the situation and did not take into account the status of Germany after 8 May 1945. Nor did some of the critics acknowledge that international law is not a sterile or vacuous jurisprudence, but is capable of finding expression, in novel circumstances, with the same virility as has marked the evolution of the common law.

The 'trial lawyer' approach was adopted for the thesis because the author felt unable to align his views and conclusions with the doctrinaire assertions of many writers on both sides of the debate. The claim of Lord Wright that 'Nuremberg Law' was simply an application of existing international law is misleading. The arguments of many of the most vocal critics that principles such as ex post facto and nullum crimen sine lege vitiated the whole Nuremberg process are not tenable. The correct view, in the author's opinion, is that the principles incorporated in the London Agreement and Charter, although not in actual existence on any universal or even generally accepted basis in international law, were nevertheless nascent at the time of the surrender of the Third Reich. Further, such nascent norms were justifiably transformed into binding rules as a consequence of the forces unleashed by Germany, as a matter of national policy, to a point at which international order and world peace were exposed to destruction and all human values were abandoned.

## NOTES

1. See Professor Geoffrey Best, 'Nuremberg and After: the continuing history of war crimes and crimes against humanity', The Stenton Lecture 1983, University of Reading 1984, pp. 3-4:

... I am using Nuremberg as a portmanteau or umbrella word to cover all the trials and tribunals established to deal with alleged war crimes and so on after the second world war. Nuremberg is a perfectly good short title for them since it was in its purposes the grandest, in its long-term consequences the weightiest, and although not quite the first, at once accepted as authorising all the others.

2. (1946) 62 L.Q.R., p. 41.
3. For example, Nuremberg Trial, I.M.T., vol. 11, Mr. Justice Jackson, U.S.A., pp. 142-152; loc. cit., vol. III, Sir Hartley Shawcross, Great Britain and Northern Ireland, pp. 94-109; loc. cit., vol. VII, General Rudenko, U.S.S.R., pp. 147-154; loc. cit., vol. V, M. de Menthon, the French Republic, pp. 388-391.
4. I.M.T. Judgment, p. 38.
5. For the verbatim text of the motion, see Appendix I, Chapter 17.
6. In an introductory chapter to Military Tribunals and International Crimes, Greenwood Press, 1971 (originally published in 1954), Dr. J.A. Appleman, of the Illinois Bar, U.S.A., gave a vivid quantitative description of the masses of documents and materials considered at Nuremberg.

## CHAPTER 2      OUTLINES OF THE DEVELOPMENT OF THE LAWS AND CUSTOMS OF WAR IN FOUR ERAS

### INTRODUCTION

It is proposed in this chapter to survey, in brief outline, the development of the laws and customs of war in four eras:

- (a) Prior to the First World War;
- (b) The period immediately following the First World War;
- (c) Between the two World Wars up to 3 September 1939; and
- (d) During the Second World War and immediately thereafter.

The purpose of such a survey is to establish the extent to which principles of international law, as they were purportedly embodied in the London Agreement and Charter of 8 August 1945 and in the Nuremberg indictment existed at the time the indictment was formally presented to the Tribunal.<sup>1</sup>

The survey involves primarily the attitudes of states and what may broadly be termed 'semi-government' or 'semi-official' agencies. However, action taken, and proposals made, by what are described as 'specialist bodies' also have been included, because they reflect the thinking of prominent jurists, scholars and international lawyers.

### THE PERIOD PRIOR TO THE FIRST WORLD WAR

Although some writers have sought to identify 'precedents' for the trial of German major war criminals at Nuremberg in isolated trials of individuals, dating from wars involving ancient Greece, through the Napoleonic era and up to the end of the 19th century<sup>2</sup>, there does not appear to be any basis for such a view. The times were different, the circumstances were dissimilar, questions of hegemony were involved and, in most of the cases, the crimes alleged were simply cases of murder.<sup>3</sup>

Professor Woetzel observed<sup>4</sup>.

... it must be concluded that it is difficult, if not impossible, to draw a parallel between the trials in ancient Greece and the I.M.T. in view of the difference in time and circumstances. In any case, modern international law has no direct roots in antiquity, and any connection between these two epochs would be extremely vague and tenuous, as far as the law of nations is concerned.

Nevertheless, there are isolated reported examples in the 18th and 19th centuries in which individuals were charged and convicted for offences punishable because they infringed 'the law of nations'.<sup>5</sup>

The Hague Conventions of 1899 and 1907 ushered in a period of new international concentration on principles considered appropriate in relation to war crimes. In the judgment of the International Military Tribunal (I.M.T.) it was stated<sup>6</sup>:

That violations of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

The concept of the 'laws of war' is described in History of the United Nations War Crimes Commission and the Development of the Laws of War in the following terms:

Laws of war are the rules of international law with which belligerents have customarily, or by special conventions, agreed to comply in case of war. They involve certain mutual legal obligations and duties respecting warfare. The origin of the laws of war can be traced back to practices of belligerents which evolved during the latter part of the Middle Ages.

That description and the supporting examples of general treaties concluded between the majority of states prior to the Hague Convention of 1907, are referable only to war crimes in the strict sense, and do not illuminate the controversial elements of the Nuremberg indictment: conspiracy, crimes against peace and crimes against humanity.<sup>7</sup>

## THE PERIOD IMMEDIATELY FOLLOWING THE FIRST WORLD WAR

### The Paris Peace Conference (1919)

Within less than three months after the Armistice it was decided at plenary session of the Preliminary Peace Conference on 25 January 1919 to establish a Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties. The Commission comprised two members named by each of the five major Powers and five members elected from among the Powers with special interests. It was required to report on, *inter alia*, the constitution and procedure of a tribunal appropriate for the trial of breaches of the laws and customs of war committed by enemy armed forces.<sup>8</sup>

The most important pronouncements of the Commission with respect to (a) acts which provoked the world war and accompanied its inception, and (b) violations of the laws and customs of war and the laws of humanity included:<sup>9</sup>

... the Commission is of opinion that, having regard to the multiplicity of crimes committed by those Powers which a short time before had on two occasions at The Hague protested their reverence for right and their respect for the principles of humanity, the public conscience insists upon a sanction which will put clearly in the light that it is not permitted, cynically to profess a disdain for the most sacred laws and the most formal undertakings.

The premeditation of a war of aggression, dissimulated under a peaceful pretence, then suddenly declared under false pretexts, is conduct which the public conscience reproves and which history will condemn, but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace (International Commission of Inquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal such as the commission is authorised to consider under its terms of reference.

... We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal.

On the special head of the breaches of the neutrality of Luxembourg and Belgium, the gravity of these outrages upon the principles of the law of nations and upon international good faith is such that they should be made the subject of a formal condemnation by the Conference.

On the whole case, including both the acts which brought about the war and those which accompanied its inception, particularly the violation of the neutrality of Belgium and Luxembourg, it would be right for the Peace Conference, in a matter so unprecedented, to adopt special measures, and even to create a special [emphasis added] organ in order to deal as they deserve with the authors of such acts.

With regard to 'violations of the Laws and Customs of War and of the Laws of Humanity', the Commission stated:

Every belligerent has, according to international law, the power and authority to try the individuals alleged to be guilty of the crimes of which an enumeration has been given in Chapter II on Violations of the Laws and Customs of War, if such persons have been taken prisoners or have otherwise fallen into its power. Each belligerent has, or has power to set up, pursuant to its own legislation, an appropriate tribunal, military or civil, for the trial of such cases. These courts would be able to try the incriminated persons according to their own procedures, and much complication and consequent delay would be avoided which would arise if all such cases were to be brought before a single tribunal.

The Commission enumerated four categories of charges for 'outrages' which it considered should be dealt with separately by what it termed 'a high tribunal'. It recommended:

- (a) That the tribunal be composed of three persons appointed by each of the following Governments: The United States of America, the British Empire, France, Italy and Japan, and one person appointed by the Governments of Belgium, Greece, Poland, Portugal, Romania, Serbia and Czechoslovakia.
- (b) That the law to be applied by the tribunal shall be 'the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience'.
- (c) That 'each Allied and Associated Government adopt such Legislation as may be necessary to support the jurisdiction of the international court, and to assure the carrying out of its sentences'.

The Commission's recommendations were an attempt to bring about the establishment of a tribunal with basic jurisdiction similar in some respects to that of the Nuremberg Tribunal twenty five years later. However, the absence of agreement within the Commission on the state of established legal principles relevant to the jurisdiction of the proposed tribunal is manifest in a 'memorandum of reservations', presented by the representatives of the United States of America, to the Commission's report.<sup>10</sup>

In the memorandum, the American representatives stated the following opinions:

- (a) ... the American representatives believed that the nations should use the machinery at hand, which had been tried and found competent, with a law and a procedure framed and therefore known in advance, rather than to create an international tribunal with a criminal jurisdiction for which there is no precedent, precept, practice, or procedure.
- (b) A judicial tribunal only deals with existing law and only administers existing law, leaving to another forum infractions of the moral law and actions contrary to the laws and principles of humanity. A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place and circumstance, and according, it may be, to the conscience of the individual judge.
- (c) ... the American representatives ... were averse to the creation of a new tribunal, of a new law, of a new penalty, which would be ex post facto in nature, and thus contrary to an express clause of the Constitution of the United States and in conflict with the law and practice of civilized communities.

Each of those three precepts was rejected by those who established and practised 'Nuremberg Law'.

The recommendations of the Commission were not adopted by the Peace Conference and were not included in the Treaty of Versailles.

In a discussion of the findings and recommendations of the Commission, the author of Chapter III of History

of U.N.W.C.C., Dr. J. Litawski, a Polish lawyer, emphasised the use by the Commission of the words 'laws of humanity' (p. 36):

... it appears that the two categories of offences with which the Commission of Fifteen concerned itself, namely, violations of the laws and customs of war, on the one hand, and offences against the laws of humanity, on the other, correspond generally speaking, to 'war crimes' and 'crimes against humanity', as they are distinguished in the two Charters of 1945 and 1946 and in the Control Council Law No. 10. Thus, in 1919 we find, for the first time, the specific juxtaposition of these two types of offences. (emphasis added).

### The Advisory Committee of Jurists, 1920

The marked differences of contemporary opinion on the state of international criminal law were illustrated when, in 1920-21, the Council of the League of Nations appointed a Committee ('the Advisory Committee of Jurists') to prepare plans for the establishment of the Permanent Court of International Justice.

In summary form, the action taken by the Committee has been thus described:<sup>11</sup>

The Council of the League of Nations, in February 1920, decided to appoint a committee for the purpose of preparing plans for the establishment of the Permanent Court of International Justice provided for in Article 14 of the Covenant.

In addition to the plan for the Permanent Court of International Justice, this Advisory Committee of Jurists adopted, as the expression of their voeu, three resolutions which were transmitted, late in 1921, to the Council and Assembly of the League of Nations. The second of these resolutions suggested the establishment of a high court of justice, separate and distinct from the International Court of Justice in organization and jurisdiction. This court was to be composed of one member for each State, to be chosen by the group of delegates from each State represented in the Permanent Court of Arbitration. The preliminary draft of this suggestion was contained in a proposal concerning 'the organization of international justice', submitted by the President of the Advisory Committee, Baron Descamps. Two of its articles, dealing with the establishment of a high court of international justice 'for the purpose of trying crimes against international public order, and against the universal law of nations', read as follows:

The High Court of International Justice is composed of one member for each State, chosen respectively by the group of delegates from each State to the Court of Arbitration.

The High Court of International Justice shall be competent to hear and determine cases which shall be submitted to it by the Assembly of the League of Nations or by the Council of the League, and which concern international public order, for instance: crimes against the universal law of nations.'

One member of the Committee, Mr. Elihu Root, a representative of the U.S.A., said that serious difficulties existed, for 'unless there is a law to be broken there can be no penalty for breaches of it. As only States are subject to international law, an individual can only be punished if the act which he has committed is punishable according to the national law which applies to the case.'<sup>12</sup> Other members expressed doubts as to the soundness of the proposal. For example, Dr. Loder said the plan suggested the establishment of a court before a definition of the law to be applied, and crimes against the universal law of nations were mentioned which were not yet defined. Under such circumstances, he said, 'the court could only be of a political nature'.<sup>13</sup>

Finally, the Committee adopted three resolutions, the second of which recommended for the consideration of the Council and of the Assembly of the League of Nations the following proposal for the establishment of a High Court of International Justice:

Article 1. A High Court of International Justice is hereby established.

Article 2. This Court shall be composed of one member for each State, to be chosen by the group of delegates of each State at the Court of Arbitration.

Article 3. The High Court of Justice shall be competent to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations.

Article 4. The Court shall have the power to define the nature of the crime, to fix the penalty and to decide the appropriate means of carrying out the sentence. It shall formulate its own rules of procedure.

On 27 October 1920, the Council of the League of Nations, in submitting the resolutions of the Committee of Jurists to the Assembly, advocated the adoption in part of the first resolution. This resolution suggested that a new inter-State conference to carry on the work of the Hague Conferences should be called as soon as possible, and that certain organisations specializing in international law should be invited to prepare draft plans to be submitted first to the various Governments and then to the conference.<sup>14</sup>

In submitting the resolutions of the Committee of Jurists to the Assembly, the Council stated its views relating to procedural step which it suggested should be taken concerning the Committee's second recommendation.<sup>15</sup>

The Council's report and that of the Committee of Jurists were referred to the Third Committee of the Assembly, which agreed with the opinion of the Council. It is significant that, in the course of the discussion, Mr. Lafontaine, the Belgian delegate, expressed the opinion that it was impossible to create an international criminal court 'since there was no defined notion of international crimes and no international penal law.'<sup>16</sup>

In its report to the Assembly, the Third Committee stated:<sup>17</sup>

The second recommendation communicated by the Jurists' Committee at The Hague advocates the establishment of a Court of International Criminal Justice, the object of which would be to prosecute crimes committed against international public order. The Third Committee holds that there is not yet any international penal law recognized by all nations, and that, if it were possible to refer certain crimes to any jurisdiction, it would be more practical to establish a special chamber in the Court of International Justice. The Committee therefore considers that there is no occasion for the Assembly of the League of Nations to adopt any resolution on this subject.

In addition, the report of the Third Committee recommended:<sup>18</sup>

The Assembly of the League of Nations invite the Council to address to the most authoritative institutions which are devoted to the study of international law a request to consider what would be the best methods of co-operative work to adopt for the more precise definition and more complete co-ordination of the rules of international law which are to be applied in the mutual relations of States.

On 18 December 1920, the Rapporteur of the Third Committee, in presenting its report to the thirty-first plenary meeting of the Assembly, said:<sup>19</sup>

The Committee is of the opinion that it would be useless to establish side by side with the Court of International Justice another Criminal Court, and that it is best to entrust criminal cases to the ordinary tribunals as is at present the custom in international procedure. If crimes of this kind should in future be

brought within the scope of an international penal law, a criminal department might be set up in the Court of International Justice. In any case, consideration of this problem is, at the moment, premature.

The Assembly did not adopt the recommendation of the Third Committee.<sup>20</sup>

There was thus a strong body of opinion within the League of Nations in 1920 that the principles of public international law had not reached a stage at which it could be asserted that international penal laws, as were later to be prescribed in the London Agreement and Charter, existed in such a form as would legally justify an indictment on the lines of that at Nuremberg.

### The Peace Treaties of 1919-23

The 1919 Commission on Responsibility prepared a draft of provisions for inserting in treaties with enemy Governments. It was based on the Commission's concept of a 'High Tribunal'. But the Japanese and American members dissented on some material provisions, and the American representatives proposed to institute a new 'Committee of Inquiry'. Rather than defer the matter further, the Commission declined to agree to the proposal and submitted a report to the Preliminary Peace Conference on 29 March, 1919.<sup>21</sup> Thus the victorious Allied Powers were obliged to sign the Treaty of Versailles without having been able to reach agreement on the trial of 'War Criminals'. It was for this reason that, with the exception of the special clause relating to the former German Emperor, Wilhelm II of Hohenzollern, the relevant provisions of the Treaty (Articles 228, 229 and 230) merely recognised the right of military tribunals to try 'war criminals'. The terms of these Articles were:

#### Article 228

The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her Allies.

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

#### Article 229

Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power.

Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.

In every case the accused will be entitled to name his own counsel.

#### Article 230

The German Government undertakes to furnish all documents and information of every kind, the production of which may be considered necessary to ensure the full knowledge of the incriminating acts, the discovery of offenders and the just appreciation of responsibility.



The American members of the Commission successfully maintained their firm view in relation to 'the laws of humanity', an expression which was not included in Articles 228 to 230. Rather, the scope of liability was confined to 'acts in violation of the laws and customs of war'. The nature of the tribunals was simply expressed as 'military'. Thus the concept of an International Tribunal as conceived for Nuremberg, even though its title included the word 'military', was no part of the Versailles Treaty or of the Peace Treaties with Austria, Hungary and Bulgaria.<sup>22</sup>

The lack of concert among the Allied Powers before and after the signing of the Treaty of Versailles, and the limitation in that Treaty of the curial bodies which would try 'war criminals' allowed Germany to take the initiative. In December 1919 a law was passed conferring on the Supreme Court of the Reich, at Leipzig, jurisdiction to try war criminals. On 25 January 1920 the German Government informed the Allied Powers that they had organised the machinery to deal with their criminals within the German judicial system.<sup>23</sup>

The provisions of Article 227 are a further example of the way in which the American view prevailed--on this occasion, in relation to the issue of the responsibility of chiefs of State for offences against the laws and customs of war. The first paragraph of Article 227 provided for the public 'arraignment' of the Kaiser 'for a supreme offence against international morality and the sanctity of treaties'. The third paragraph constituted a political statement. Clearly, the intention was to establish a legal basis, by reliance on the peace treaty provision, for the trial of the Kaiser by a 'special tribunal' of five judges, one from each of the five Allied Powers. The concept of 'international morality and the sanctity of treaties', each such concept being one of moral judgment, was to be the basis of the tribunal's jurisdiction.<sup>24</sup>

### Peace treaties with Turkey

It would not be necessary to consider, in the context of this chapter, the peace treaties with Turkey but for the manner in which they were perceived by Dr. Litawski, the author of Chapter III of History of U. N. W. C. C.

The first peace treaty with Turkey--the Treaty of Sevres--was signed on 10 August 1920. Articles 226-228 followed the pattern of Articles 228-230 of the Treaty of Versailles. In addition, Article 230 contained the following provisions:

The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914.

The Allied Powers reserve to themselves the right to designate the Tribunal which shall try the persons so accused, and the Turkish Government undertakes to recognise such Tribunal.

In the event of the League of Nations having created in sufficient time a Tribunal competent to deal with the said massacres, the Allied Powers reserve to themselves the right to bring the accused persons mentioned above before such Tribunal, and the Turkish Government undertakes equally to recognise such Tribunal.

It can be accepted that Article 230 was intended to be applicable to the massacres committed by Turkish forces and authorities against Turkish subjects (Armenians and the Greek-speaking population of Turkey). These massacres had been the subject of a Declaration on 28 May 1915 by the Governments of France, Great Britain and Russia, in which those Powers stated that all members of the Turkish Government and its implicated agents would be held responsible.<sup>25</sup>

The author of the chapter cited above asserted:<sup>26</sup>

The warning thus given to the Turkish Government on that occasion by the Governments of the Triple

Entente dealt precisely with one of the types of acts which the modern term 'crimes against humanity' is intended to cover, namely, inhumane acts committed by a government against its own subjects.

It was also asserted<sup>27</sup> that '... in this [the Versailles] Treaty, as well as in the Peace Treaties with Austria, Hungary and Bulgaria, the view of the American members [of the Commission on Responsibility] eventually prevailed, and references to the "laws of humanity" do not appear in these treaties'.

The same author, referring to Article 230 of the Treaty of Sevres, stated:<sup>29</sup>

This article constitutes, therefore, a precedent for Articles 6(c) and 5(c) of the Nuremberg and Tokyo Charters, and offers an example of one of, the categories of 'crimes against humanity' as understood by these enactments.

However, the cited assertions, considered collectively, ignore two principal matters. First, they disregard the fact that the expression 'crimes against humanity' was excluded from all relevant treaties, and only the words 'acts in violation of the laws and customs of war' 'criminal acts', and (in the case of the Treaty of Sevres) 'massacres' were used. Second, they ignore the fact that the Treaty of Sevres was not ratified and did not become effective. In its place the Treaty of Lausanne was signed on 24 July 1923. This made no reference to 'war crimes'. Instead, despite the 1915 Declaration by the Governments of France, Great Britain and Russia and the 1920 Treaty, the Treaty of Lausanne was accompanied by a 'Declaration of Amnesty' for all offences committed between 1 August 1914 and 20 November 1922. This was presumably because of Soviet pressure.

It is difficult therefore to accept the assertion that Article 230 of the Treaty of Sevres was a precedent for Article 6(c) of the Nuremberg Charter. A warning in 1915 which did not lead to any action, a provision in a treaty which was made in 1920 but not ratified and a 'Declaration of Amnesty' in 1923 are unimpressive support for a precedent for Article 6(c) of the Nuremberg Charter.<sup>30</sup>

### The Leipzig trials

Much of the preparation for the London Agreement and the Nuremberg Charter should, irrespective of the extent to which it was justified in law, be examined against the background of the Leipzig trials and the fate of the former Emperor of Germany.

The Leipzig trials are generally seen by historians to have been farcical and demeaning to the Allied Powers.<sup>31</sup> The reluctance of the German authorities to hand over to the Allied and Associated Powers 'persons accused of having committed acts in violation of the laws and customs of war' (Article 228 of the Treaty of Versailles) led to a compromise proposal by the German Government that instead of handing over accused persons to the Allies, the German Government would bring the accused persons, to trial before the Supreme Court of the German Empire sitting in Leipzig. Following a declaration by a commission, appointed to examine the proposal, that it was 'compatible' with Article 228 of the Versailles Treaty, it was accepted with a qualification, which was never implemented, that if justice was not administered in good faith and a fair punishment was not imposed upon the guilty, the Allies would set aside the proceedings and bring the accused for a new trial before their own courts'.

The details of the Leipzig trials are not of present direct relevance, but the following summary demonstrates that those who were responsible for bringing 'Nuremberg Law' into existence must have been resolute to avoid a repetition of the juridical sabotage at Leipzig of the provisions of Article 228 of the Treaty of Versailles:<sup>32</sup>

The net result of the trials was that out of a total of 901 cases of revolting crimes brought before the Leipzig Court, 888 accused were acquitted or summarily dismissed, and only 13 ended in a conviction; furthermore, although the sentences were so inadequate, those who had been convicted were not even made to serve their sentences. Several escaped and the prison warders who had engineered their escapes were publicly congratulated.

The lessons which the Allied representatives who framed the London Agreement and Charter in 1945 must have learned from the legal aftermath of the First World War, are clear:<sup>33</sup>

... it is apparent that the demand by public opinion that the war criminals of 1914-1918 should be made to answer for their crimes had ended in a failure. When one reads Articles 228 and 229 of the Versailles Treaty it is obvious that the German offer to try the war criminals before their own courts was in complete opposition with the letter and with the spirit of the Treaty. The fact that only about ten accused were sentenced to punishments which were quite out of proportion with the gravity of the crimes, and that these penalties were never really served, showed the German public that the provisions of the Treaty of Versailles concerning retribution were being flouted, and led them to believe that the other provisions of the Treaty could be just as easily disregarded.

### Kaiser Wilhelm II

Article 227 of the Versailles Treaty came into force on 10 January 1920, by which time the former Emperor of Germany had been given refuge in Netherlands. The details of the negotiations for the extradition of the former Emperor are significant only from the viewpoint of the legal basis on which it was sought and on which it was refused.

Article 227 provided:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for a surrender to them of the Ex-Emperor in order that he may be put on trial.

On 16 January 1920 the Secretary-General of the Peace Conference addressed a letter, signed by Clemenceau, to the Dutch Minister seeking the handing over of the former Kaiser. It contained details of several crimes committed by the Germans during the war.

The response by the Minister of the Dutch Government was given on 24 January 1920. The refusal of the request for extradition was based on four grounds:<sup>34</sup>

- (a) Holland was not a party to Article 227 of the Treaty of Versailles;
- (b) Holland could not accept the international duty 'of associating herself with an act of high international politics of the Powers';
- (c) Should, however, the League of Nations establish an international body competent to decree in a case of war on facts qualified as crimes and provide sanctions beforehand (emphasis added)—Holland would adhere to this; and

- (d) Holland had 'des tout temps' been 'une terre de refuge pour les vaincus des conflits internationaux'.

The legal foundations for the refusal of extradition as set forth in the letter of the Dutch Government were:

- (a) Article 4 of the Dutch Constitution provides for equal protection for both Dutch and foreigners on Dutch soil; this was laid down in the Law of 6th April, 1875, revised 15th April, 1886, on which extradition treaties with France (1895), Great Britain (1898) and the United States (1887) were concluded.
- (b) In view of the above, the request for extradition should have been formulated in accordance with the laws and treaties of Holland.
- (c) The crime for which extradition had been sought was qualified 'L'offense supreme contre la morale internationale et l'autorite des traites .....ne figure pas dans les enales inserees dans les lois de Hollande ou les traits par elle conclus'. Nor could the Dutch Government have rendered legal help for the repression for an act which was not punishable even according to foreign law.
- (d) The political character of the crimes did not qualify the case for extradition.

On 15 February 1920 a new Note was addressed to the Dutch Government seeking a revision of its view. The Note used the expression 'les droits et les principes de l'humanite'.<sup>35</sup> The Dutch Government declined to reverse its previous decision.

The refusal of the request for the extradition of the former Kaiser reflects the differences of opinion which prevailed at the time in relation to the legal basis of the charges against him. From the contemporary records,<sup>36</sup> it seems likely that the basic justification for the Dutch Government's refusal of the request for extradition was that either the wrong procedure was adopted or there was in existence no appropriate procedure. Of probable equal weight, however, was the failure of the Allied Powers to particularise the precise legal character of the former Kaiser's conduct. As the author of Chapter XI of History of U.N.W.C.C. stated (at p. 242):

The Powers claimed him, without qualifying his deeds from a strictly legal point of view, for 'moral responsibility', which is not a legal term at all, and for 'the laws and principles of humanity', which were not recognised legal terms either.

## THE PERIOD BETWEEN THE TWO WORLD WARS UP TO 3 SEPTEMBER 1939

### The Covenant of the League of Nations

Twice in the present century, the end of a World War has been followed by the establishment of an international organisation designed to promote; peace among nations. The first was the League of Nations, created after the First World War; the second was the United Nations Organisation, established in 1945.

The endeavours of the members of each body did not meet with, and have not met with, any significant success, particularly in the case of the League of Nations. It cannot be argued that the League, through its activities, was responsible for any developments of significance in the concept of the principles of international criminal law, although it was responsible for the framing of the Covenant. This was not due to the fault of the members of the League but rather to the limitations in the Covenant within which it operated. In Chapter IV of History of

U.N.W.C.C. it was stated:

The Covenant of the League of Nations sought to eliminate war but it stopped half way. It did not outlaw war, but, by means of Articles 12, 13 and 15, it endeavoured to delay the outbreak of wars, by insisting on the submission of disputes likely to lead to war to arbitration or judicial settlement.

From the viewpoint of the extent to which there was, in 1919, a body of recognised principles of international criminal law, paragraph 7 of Article 15 of the League's Charter is significant. Despite the provisions in Articles 12, 13 and 14 for the settlement of disputes between nations, paragraph 7 of Article 15 stipulated that if the Council of the League could not reach a unanimous decision, after the failure of other attempts at settlement under preceding Articles of the Covenant, 'the members of the League reserve to themselves the right to take such action as they may consider necessary for the maintenance of right and justice' (emphasis added). The author of Chapter IV of History of U.N.W.C.C. observed (p. 53) that 'this paragraph was the notorious "gap" in the Covenant by which any war, even an aggressive one, could be waged within the bounds of legality'. This 'gap' continued to exist throughout the history of the League, despite the provisions in Article 16 for the use of so-called 'sanctions', which were not a powerful or effective deterrent, either in theory or practice. However, various other treaties sought to fill the 'gap'.

### The Draft Treaty of Mutual Assistance and the Unratified Geneva Protocol, 1924

Article 8 of the Covenant of the League prescribed the principle of the reduction of armaments, but its implementation involved technical difficulties and little progress was made. The impotence of the provisions in Article 8 is thus emphasised by F.P. Walters, formerly Deputy Secretary General of the League of Nations<sup>37</sup>:

The essence of [Article 8] of the Covenant was that the States should renounce their right to be the sole judges of their own armaments, and that this most dangerous of all questions, the very heart and fortress of nationalism, should be brought under international control. Neither this nor any of the obligations of the Covenant in regard to disarmament was destined to be fulfilled. No such plan as had been there foreseen was ever prepared by the Council. The arms traffic was never brought under the control of the League. Private manufacture of war material was neither prohibited nor regulated. The pledge that full and frank information as to their armed forces and their war industries should be exchanged between Members of the League was treated as impracticable ... The principal governments of the world continued to believe that their security depended above all on maintaining armaments equal or superior to those of their neighbours ... each country insisted on maintaining the right to be the judge of its own needs.

The unwillingness of many states to abide by the provisions of Article 8 of the Covenant without a collateral system of guarantees against aggression led to the drafting in 1923 of a 'Treaty of Mutual Assistance', whereby it was provided, inter alia, that 'aggressive war is an international crime'.<sup>38</sup> The Draft Treaty received a mixed reception by member states. It was followed by the preparation by the Assembly of the League of a 'Protocol for the Pacific Settlement of International Disputes', in the preamble of which it was again stated that 'a war of aggression constitutes ... an international crime'.<sup>39</sup> Discussion of the Protocol within the League merely resulted in a further declaration by the Assembly that a war of aggression should be regarded as an international crime. However, neither the Draft Treaty nor the Protocol was ratified. Thus, although war was declared in two instruments to be a criminal act, neither of the instruments was ever ratified, and, for the time being, the principle was not accepted as a statutory part of international law.<sup>40</sup>

### The Locarno Treaties

The fragile character of the treaties made in the 1920s is demonstrated by the sequel to the signing of a series of treaties and conventions at Locarno on 16 October 1925, involving several nations. The most important was the Treaty of Mutual Guarantee between Germany, Belgium, France, Great Britain and Italy. Two of the series were Arbitration Conventions to which Germany was a party; other nations involved were Belgium, France, Poland and Czechoslovakia.

In History of U.N.W.C.C., p. 57, the following summary is given of the attitude of the League of Nations to these agreements:

The Assembly, during its session in 1926, noted the importance of the Treaties of Locarno. It considered that the general ideas embodied in these treaties, whereby provision was made for conciliation and security by the mutual guaranteeing of States against any unprovoked aggression, might be applied to different parts of the world and should be accepted among the fundamental rules which should govern the foreign policy of every civilised nation. The Assembly expressed the hope that other Governments would put these principles into practice.

The fact that Germany, in March 1936, committed deliberate breaches of the Locarno Treaty by the occupation of the Rhineland is a matter of history. However, what is not always recognised is that those breaches were condoned. When France protested to the Council of the League over Germany's action, the Council met in London. The German representative, von Ribbentrop (later to be sentenced to death at Nuremberg), argued that France had violated the Locarno agreements by signing the Franco-Soviet pact in 1935. He said that Germany was prepared to offer Europe an agreement guaranteeing peace for 25 years. The British Foreign Secretary took the view that the breach of the Treaty did not carry with it any threat of hostilities or involve immediate action. Consequently, no action was taken, although Britain and France notified Belgium that they considered her released from any obligations under the Treaty of Locarno.<sup>41</sup>

The breaches by Germany of the Treaty of Locarno were the subject of particulars in paragraph VII of Appendix C of the Nuremberg indictment (see Chapter 8).

#### General Act for the Pacific Settlement of International Disputes, 1928

The Act is mentioned in this section because, following the Locarno Treaties and the Pact of Paris,<sup>42</sup> it recognised the desire of many members of the League that the Pact of Paris should be supplemented by positive obligations on the signatories to resort to the pacific settlement of disputes. However, when the Act was introduced into the Assembly it met opposition. The delegate of Hungary said his country could not fulfil the moral duty of putting the Act into effect without adequate guarantees of security. He asked: 'How can we, disarmed and defenceless, conclude a treaty of mutual assistance with nations armed to the teeth?' Accordingly, the Hungarian delegation refrained from voting for the General Act.<sup>43</sup>

A discussion of the Pact of Paris is deferred until Chapter 18.

#### The Italo-Abyssinian War<sup>44</sup>

The discussions within the framework of the League of Nations on the conflict between Italy and Abyssinia, which continued from December 1935 until May 1936, highlighted two important facts: one was the incapacity of the League to fulfil its Charter of achieving the goal 1 of peace between nations; the other demonstrated the ambivalence of many nations in their adherence to the letter of the League's Covenant and the provisions of the Pact of Paris.

The imposition of sanctions against Italy in accordance with Article 16 of the Charter appears to have been half-hearted and certainly was ineffective. By a resolution of 4 July 1936, the League formally abandoned sanctions, and, in doing so, acknowledged its failure in the matter.<sup>45</sup>

More importantly, the British Government, on 16 April 1938, concluded an agreement with Italy, whereby it recognised the de facto Italian Government in Abyssinia, the capital of which, Addis Ababa, was occupied by Italy on 5 May 1936, four days before Italy formally annexed the State of Abyssinia. Some other member States of the League recognised the annexation, but others did not do so. The expressed attitude of the British Government at the meeting of the Council of the League on 16 April 1938 was that 'the recognition of a de facto

situation could not be held up indefinitely by adherence to international principles of morality<sup>46</sup> (emphasis added).

The final decision of the Council is summarised in these terms: 'The Council ... decided, in view of the admission in the Assembly's resolution of 4 July 1936 that the League had failed, ... that the question of the recognition of Italy's position in Ethiopia was one which every member of the League must be held entitled to decide for itself in the light of its own situation and obligations'.<sup>47</sup>

The decision of the Council, made only a few weeks after the annexation by Germany of Austria, illustrates the ambivalent attitude of member states of the League. In the case of Italy, its breach of the Pact of Paris was condoned; in the case of Germany, its similar, although far more outrageous, act against Austria was made the subject of a charge in the Nuremberg indictment. Although the circumstances of the two cases were very different, and the annexation of Austria was only one of many violations of treaties pleaded in the Nuremberg indictment, nevertheless the Pact of Paris was broken in each case, followed by annexation. The Tribunal at Nuremberg placed considerable emphasis' on the binding force of the Pact of Paris.<sup>48</sup>

### The Japanese occupation of Manchuria and the Sino-Japanese War<sup>49</sup>

Although on an infinitesimal scale compared with actions of the German Government that involved the, violation of treaties and conventions, the Japanese aggression which precipitated the Sino-Japanese War in 1931 was frequently denounced as a breach of treaties, in particular of the Pact of Paris. Again, discussion within the League of Nations was protracted. The Council declared the applicability to Japan of Article 16 of the Covenant, but the provision for sanctions was not implemented.<sup>50</sup>

The resolutions of the League were of little, if any, help to China, and the final resolution in the saga, on 30 September 1938, again reflected the impotence of the League and the readiness of nations to condone the breach of the Pact of Paris. The resolution stated, in part, that:

... The grave international tension that had developed in another part of the world could not make them [that is, members of the League] forget the sufferings of the Chinese people, their duty of doing nothing that might weaken China's power of resistance, or their undertaking to consider how far they could individually extend aid to China.<sup>51</sup>

### Proposals of Specialist Bodies

The International Law Association (I.L.A.) This is a body which, although not closely knit, met regularly. From time to time, its members discussed matters relating to the laws of war.

At its Thirtieth Conference at The Hague in 1921, it considered a proposal that there should be a codification of the laws of war, but the proposal was not implemented.<sup>52</sup>

In the following year, at its Thirty First Conference at Buenos Aires, following the initiative of Dr. Hugh H.L. Bellot, it was resolved that the creation of an International Criminal Court was essential in the interests of justice.<sup>53</sup>

In accordance with an instruction to Dr. Bellot at that conference, he presented to the Thirty Third Conference of the Association at Stockholm in 1924 a draft statute for a permanent international criminal court. Following discussion, the Conference, without expressing any view upon 'the practicability or expediency' of the proposal, referred it to a Committee to 'see if a scheme for such a Court can be composed'.<sup>54</sup>

That Committee, termed 'the Permanent International Criminal Court committee', reported to the Thirty Fourth Conference of the Association at Vienna in 1926, that its opinion was that the creation of a permanent international criminal court was not only 'highly expedient, but also practicable'.<sup>55</sup>

The draft statute presented by Dr. Bellot provided for the establishment of an International Penal Court as a Division of the Permanent Court of International Justice at The Hague, with separate jurisdiction 'in the cases of States and individuals charged with international offences as hereinafter defined'<sup>56</sup> (emphasis added). The Seat of the Court was to be at The Hague.

Article 21 provided for the jurisdiction of the Court in the following terms:

The jurisdiction of the Court shall extend to all charges of:

- (a) Violations of international obligations of a penal character committed by the subjects or citizens of one State or by a heimatlos against another State or its subjects or citizens.
- (b) Violations of any treaty, convention or declaration binding on the States parties to the Convention of ..., which regulate the methods and conduct of warfare.
- (c) Violations of the laws and customs of war generally accepted as binding by civilised nations.

Without prejudice to the original jurisdiction of the Court as hereinbefore defined, the Court shall have power to deal with cases of a penal character referred to it by the Council or Assembly of the League of Nations for trial, or for inquiry and report.

In the event of a dispute as to whether the Court has jurisdiction the matter shall be settled by the decision of the Court.

The terms of the draft statute, which may be taken as reflecting the opinions at the time of persons with expert knowledge of the basic principles of international criminal law, were a much more specific expression of those principles than had previously existed. In particular, the provisions that judgment only could be pronounced, but that sentence could not be passed, in respect of a state or a subject or citizen of a state which was not a party to the Convention or had not accepted the jurisdiction of the Court, were a recognition that, unless a state was a party to the Convention or had accepted the jurisdiction of the Court, it was jurisprudentially unsound to inflict punishment, at least by way of sentence.<sup>57</sup> Nevertheless, those provisions were a recognition of the principle of consent.

The provision in paragraph (a) of Article 21 that 'violations of international obligations' were only justiciable if the obligations were 'of a penal character' represents the limit to which the concept of the exercise of criminal jurisdiction by an international court, had, in the opinion of the Association, advanced by the year 1926.

The Inter-Parliamentary Union. The Twenty Third Conference of the Inter-Parliamentary Union, which comprised European and American members of Parliament, was held in Washington, D.C., and in Ottawa in 1925. It considered a report submitted by Professor M.V.V. Pella, Professor at the University of Bucharest and a member of the Romanian Parliament, on behalf of the Permanent Committee for the Study of Juridical Questions of the Union, concerning the criminality of wars of aggression and the organization of international repressive measures.

The Conference passed a resolution to institute a permanent sub-committee within the Committee for the Study of Juridical Questions: (a) to undertake the study of all the social, political, economic and moral causes of wars of aggression to find practical solutions for the prevention of that crime; and (b) to draw up a preliminary draft of an International Legal Code.

The Conference directed the attention of the sub-committee to the fundamental principles stated by Professor Pella in his report and which were summarised in an annex to the resolution. <sup>58</sup> Paragraphs 1-4 of the annex provided:



1. The International Legal Code must apply to all nations.
2. Measures of repression should apply not only to the act of declaring a war of aggression, but also to all acts on the part of individuals or of bodies of persons with a view to the preparation or the setting in motion of a war of aggression.
3. The principle should be recognised that individuals, independently of the responsibility of States, are answerable for offences against public international order and the law of nations.
4. The Offences committed by States or by individuals should be laid down and penalties provided for in advance in enactments drawn in precise terms. International repression should be founded on the principle nulla poena sine lege (emphasis added).

A number of sanctions applicable to individuals were prescribed in the annex, but they did not include the death penalty.

The list of offences committed by individuals which it was proposed should be justiciable under the International Legal Code included 'international military offences and all other acts performed in time of war which are contrary to the rules and customs of international law' (emphasis added) and 'ordinary common law offences committed by foreign armies in occupied territories (massacre, pillage etc.): that is, crimes similar to, or analogous to, the crimes charged in Count 3 of the Nuremberg indictment'.<sup>59</sup>

### The International Congress of Penal Law

The first International Congress of Penal Law was organised by the International Association for Penal Law and held at Brussels in 1926. Twelve reports and other documents were submitted on the subject of international criminal jurisdiction and discussion was based on Professor Pella's conclusions (see above). The Congress recommended that the Permanent Court of International Justice be given punitive powers, that it be competent to judge any penal liability of a state as a result of an 'unjust aggression' or any violation of international law, and that in addition it have jurisdiction to 'judge individual liabilities incurred as a result of crimes of aggression and similar crimes or offences and any violation of international law committed in peace or war'. There was also a specific proposal that 'all violations committed by States or by individuals should be provided for and sanctioned in advance by precise texts'. The Congress expressed the opinion that 'the end in view, namely the inauguration of a system of international penal justice, should be, realized progressively through separate agreements concluded between States and acceded to by other States'.

The Congress also recommended that a committee of the Association be established to prepare a draft statute of an international criminal court. This Committee first met in Paris in 1927. It charged Professor Pella with the drafting of this document. It adopted his draft in January 1928. The draft was communicated to all the governments represented at the Congress and to the League of Nations. The Congress was not an official body and lacked authority to implement its resolutions.

### The Convention for the Creation of an International Criminal Court (1937)

The difficulty in prescribing rules of international law in the field of terrorism, which has some general analogies with the whole question of war crimes, was illustrated by the activities of the League of Nations in the 1930s. The genesis of these activities was the assassination of King Alexander of Yugoslavia at Marseilles on 9 October 1934. As a result, the French Government addressed a letter to the Secretary General of the League of Nations 'emphasizing the need for ensuring the effective suppression of political crimes of an international character and containing a statement of principles upon which an International convention for the suppression of terrorism might be based'.<sup>60</sup>

The response by the Council was significant from the viewpoint of its perception of the then current state of international criminal law. In a resolution adopted by the Council on 10 December 1934 <sup>61</sup>, it expressed the

view that 'the rules of international law concerning the repression of terrorist activity are not at present sufficiently precise to guarantee efficiently international co-operation in this matter'. Nevertheless, it established a 'Committee of Experts' to examine the matter and to draw up a preliminary draft of an international convention 'to assure the repression of conspiracies or crimes committed with a political and terrorist purpose'.<sup>62</sup> The progress towards the goal of an international convention, was slow, but in November 1937 the 'International Conference on the Repression of Terrorism', established by the Council of the League, considered two draft conventions prepared by the Committee of Experts, the second of which related to the creation of an international criminal court.<sup>63</sup> The Convention provided for:

- . An International Criminal Court, with its seat at The Hague, comprised of five regular judges and five deputy judges;
- . The application of substantive criminal law which 'shall be that which is the least severe. In determining what that law is, the Court shall take into consideration the law of the territory on which the offence was committed and the law of the country which committed the accused to it for trial. ... Any dispute as to what substantive criminal law is applicable shall be decided by the Court'.

The Convention comprised fifty six Articles, most of which were procedural. It was opened for signature at Geneva on 16 November 1937.

The significant feature of the Convention was that the national laws of the contracting parties were made the criteria for the determination of acts as criminal. This method of providing a basis for the trials of international terrorists had the advantage of achieving precision, and may have led to a similar approach in respect to war criminals. Further progress was precluded, however, by the outbreak of World War II, by which time the Convention had not come into force.

## THE PERIOD DURING THE SECOND WORLD WAR AND IMMEDIATELY THEREAFTER

From 1941 onwards the trial of war criminals became a major issue for the Allied Powers, and remained so until the end of the war. This period of more than three years was marked by a number of declarations by the leaders of the Allied Powers of their intentions to bring Axis war criminals to trial (see Chapter 4) and by discussions by a number of bodies, official and semi-official, of the concept of some form of international tribunal.

### The London International Assembly

The London International Assembly, although not an official body, was created in 1941 under the auspices of the League of Nations Union. Its members were recognised by the Allied Governments established in London, to which it made recommendations.

By the middle of 1943 the Assembly had reached certain conclusions, which were adopted on 21 June 1943. A proposal for an International Criminal Court was included, and its jurisdiction stated as follows:<sup>64</sup>

That an International Criminal Court shall be instituted, and that it shall have jurisdiction over the following categories of war crimes:

- (a) Crimes in respect of which no national court of any of the United Nations has jurisdiction (e.g. crimes committed in Germany against Jews and stateless persons and possibly against Allied nations);
- (b) Crimes in respect of which a national court of any of the United Nations has jurisdiction but which the State concerned elects not to try in its own courts (for reasons such as the following: where a trial in the country concerned might lead to disturbances; where a national court would

find it difficult to obtain evidence );

- (c) Crimes which have been committed or which have taken effect in several countries or against nationals of different countries;
- (d) Crimes committed by Heads of States.

The principal provisions of the accompanying Draft Convention for the Creation of an International Criminal Court, which contained sixty two Articles, were:<sup>65</sup>

#### Article 1

The United Nations hereby establish an International Criminal Court for the trial, as hereinafter provided, of persons accused of war crimes.

#### Article 2

1. War crimes are any grave outrages violating the general principles of criminal, law as recognised by civilised nations and committed in wartime or connected with the preparation, the waging or the prosecution of war, or perpetrated with a view to preventing the restoration of peace.
2. War crimes can be perpetrated, either by direct action, or by participating in the crime, by aiding or abetting, inciting, conspiring or giving the order to commit the crime.
3. War crimes can be perpetrated, as a principal or an accessory, by any person whatever, irrespective of his rank or position, Heads of State included.

The scope of the proposed court's jurisdiction was thus expressed:

#### Article 3

1. As a rule, no case shall be brought before the Court when a domestic court of any one of the United Nations has jurisdiction to try the accused and it is in a position and willing to exercise such jurisdiction.
2. Accused persons in respect of whom the domestic courts of two or more United Nations have jurisdiction may however, by mutual agreement of the High Contracting Parties concerned, be brought before the Court.
3. Provided that the Court consents, any crime as defined in Article 2 may be brought before the International Criminal Court, either by national legislation of the State concerned, or by mutual agreement of the High Contracting Parties concerned in the trial.

The Seat of the court was to be established in London, although the Court could decide to sit elsewhere. The official language of the Court was to be English.

The most significant provisions, in the present context, were contained in Article 27, as follows:

#### Law to be Applied

1. Until a convention laying down the main principles of international criminal law, defining the crimes and affixing penalties to them has been agreed upon, the Court shall apply:
  - (a) International custom, as evidence of a general practice accepted as law;
  - (b) International treaties, conventions and declarations, whether general or particular, recognised by the High Contracting Parties;
  - (c) The general principles of criminal law recognised by the United Nations;
  - (d) Judicial decisions and doctrines of highly qualified publicists as subsidiary means for the determination of rules of law.
2. No act may be tried as an offence unless it is specified as a criminal offence either by the law of the country of the accused, or by the law of his residence at the time of the commission of the act, or by the law of the place where the act was carried out, provided in each case that such law is in accordance with the general principles of criminal law recognised by the United Nations. (Emphasis added at beginning of the Article).

The only interpretation to which Article 27 is open is that in 1943 the London International Assembly did not consider that 'the main principles of international criminal law' had been established with sufficient precision and certainty so as to form an acceptable basis for the proposed court.

Furthermore, the Draft Convention of 1943, proposed some two years before the execution of the London Agreement and Charter, placed jurisdictional emphasis on municipal law. It was such emphasis that those who framed the London Agreement and Charter were at pains to exclude, so that municipal law would give way to the 'international law' which was embodied in the Agreement and Charter (see Chapter 7).

### The International Commission for Penal Reconstruction and Development

The deliberations of the International Commission for Penal Reconstruction and Development, a semi-official body comprising jurists from the United Kingdom and a number of Allied countries, did not publicly make any specific proposals in respect of an international criminal court.<sup>66</sup> However, the following account of the views of members of the Commission is important in relation to the perceived state of international criminal law in the 1940s:

In July 1942 a committee, including all the members of the Commission and set up to advise on the rules and procedure relating to the punishment of crimes committed in the course of and incidental to the Second World War, adopted an interim resolution stating that 'while most of us believe that the time is ripe for the establishment of a Permanent International Criminal Court, we all hold the provisional view that a very large percentage of the crimes which have been and will be committed incidental to and in the course of the present war (which for the present we shall merely refer to as "war crimes") can be punished by means of the jurisdiction of the municipal courts of the Allied Powers both civil and military'.

The chairman of the committee on rules and procedure, Sir Arnold McNair, stated his opinion that the vast majority of criminal acts perpetrated by enemy nationals could be punished by resorting to existing national laws and tribunals. ... there were several powerful arguments against the creation of an international criminal court and an international criminal code to be administered by it.

Other members of the Commission, while agreeing that, as a rule, war criminals should be tried by municipal courts, felt that there were instances where an international court would be needed. One member, Dr. J.M. de Moor (Netherlands), listed as such instances the same categories of crimes as those mentioned by the London International Assembly ... A similar view was, in this respect, taken by other members who favoured an international jurisdiction. No elaborate proposals concerning the organization of the tribunal envisaged were submitted, but it may be noted that some members of the Commission suggested that

the court should include neutral and even enemy judges.<sup>67</sup>

The proposals of the Commission and its committee did not lead to any concrete plan considered in official circles.

### The United Nations War Crimes Commission<sup>68</sup>

The United Nations War Crimes Commission was established at a meeting held at the British Foreign Office, London, on 20 October 1943.

In an introductory chapter to the History of the United Nations War Crimes Commission and the Development of the Law of War<sup>69</sup>, Lord Wright, Chairman of the Commission from January 1945 until it was disbanded in March 1948, stated:<sup>70</sup>

... through the work of the Commission and other agencies, the United Nations had ready to their hands when the time came, a more or less practical scheme for the prosecution and punishment of war criminals, which was capable of being completed and put into effect when the Nazi resistance collapsed.

Lord Wright's cited statement was obviously a reference to the 'Draft convention for the establishment of a United Nations war crimes court, with an explanatory memorandum', approved by the Commission on 26 September 1944 and dated 30 September 1944.<sup>71</sup>

That document is, from a legal viewpoint, the most comprehensive and authoritative, because of the manner in which the Commission was established, of all the non-Government documents which preceded the London Agreement and Charter of 8 August 1945. The fact that the preparation of the draft convention may have been beyond the limited scope of the Commission's objects and powers<sup>72</sup> is immaterial. Its importance lies in the evidence which it provides of the conception at the time by some Allied Powers of the extent to which the principles of international criminal law had become established and were enforceable against the vanquished. It can be seen as part of the initial framework of the Agreement and Charter.

The draft convention may conveniently be examined under the following heads:<sup>73</sup> (a) the preamble; (b) jurisdictional scope; (c) applicable law. Relevant provisions were:

The preamble stated that the High Contracting Parties:

... desirous of ensuring that the perpetrators of war crimes committed by the enemy shall be brought to justice, Recognising that in general the appropriate tribunals for the trial and punishment of such crimes will be national courts of the United Nations,

... Have decided to set up an Inter-Allied Court before which the Governments of the United Nations may at their discretion bring to trial persons accused of an offence to which the Convention applies in preference to bringing them before a national court, ...

(There followed twenty nine Articles)

The most significant provisions of the Articles are reproduced as follows:

#### Article 1

1. There shall be established a United Nations War Crimes Court for the trial and punishment of

persons charged with the commission of an offence against the laws and customs of war.

2. The jurisdiction of the Court shall extend to the trial and punishment of any person--irrespective of rank or position-- who has committed, or attempted to commit, or has ordered, caused, aided, abetted or incited another person to commit, or by his failure to fulfil a duty incumbent upon him has himself committed, an offence against the laws and customs of war.

#### Article 18

The Court shall apply:

- (a) General international treaties or conventions declaratory of the laws of war, and particular treaties or conventions establishing laws of war between the parties thereto;
- (b) International customs of war, as evidence of a general practice accepted as law;
- (c) The principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience;
- (d) The principles of criminal law generally recognised by civilized nations;
- (e) Judicial decisions as subsidiary means for the determination of the rules of the laws of war.

In an accompanying explanatory memorandum it was stated:

The draft of the convention is self-explanatory. But, during the discussion of the draft there emerged from time to time certain points which, in the opinion of the Commission, would require elaboration. A number of these have been settled or clarified in the text of the draft convention as it gradually took its definite shape. There remain, however, certain matters which, as they have not found their way into the final text, have to be specifically dealt with in this memorandum.

(a) During the preparatory work on the convention certain drafts were submitted in which a detailed list of war crimes was included in article 1. The list was not meant to be exhaustive and, after considerable discussion, the Commission found it appropriate not to include a detailed list but to confine itself to the terms of the first paragraph of article 1--'an offence against the laws and customs of war'. It is considered that this will give the Court the necessary latitude of action to carry out the intention of the Allied Governments as expressed in numerous public statements, notably the Declaration in Moscow dated 1 November 1943.

(b) The Commission has considered the question of 'Superior Orders'. It finally decided to leave out any provision on the subject for the same reason as that for which it left out the detailed list of war crimes. The Commission considers that it is better to leave it to the Court itself in each case to decide what weight should be attached to a plea of superior orders. But the Commission wants to make it clear that its members unanimously agree that in principle this plea does not of itself exonerate the offender.

It is obvious, but understandable, that the draft convention lacked the practical approach subsequently adopted in the final form of the London Agreement and Charter, compared with which its provisions were much less precise and less definite. More importantly, the authors of the draft convention -

Did not purport to declare the law, as was done in the London Agreement and Charter, particularly

in Article 6 of the Charter;

Did not attempt to make of the essence of the trials, allegations of (a) a common plan or conspiracy (Count 1); (b) crimes against peace (Count 2); or (c) crimes against humanity (Count 4); and

Did not provide for declarations of the criminality of groups or organisations (Articles 9, 10 and 11 of the Charter).

Indeed, the scope of the jurisdiction of the proposed United Nations War Crimes Court was expressly confined to 'an offence against the laws and customs of war' (Article 1). Article 18 should be interpreted simply as definitive of the basis of the jurisdiction expressed in Article 1.

On 6 October 1944, the Chairman of the Commission sent copies of the draft convention and the explanatory memorandum to the British Foreign Secretary, Mr. Eden, to whom he also conveyed the unanimous request of the Commission that Mr. Eden should 'convene a diplomatic conference to consider, and if thought fit to conclude, a Convention for the Establishment of a United Nations Court'.<sup>74</sup>

Eventually, on 4 January 1945, the British Foreign Secretary replied to the Chairman of the Commission. Because it illustrates the difficulties and delay caused by the lack of agreement between the Allied Powers, the reply is set out as follows:<sup>75</sup>

... I think that both you and the other members of your Commission are well aware that His Majesty's Government have throughout doubted the desirability and the practicability, especially in view of the time factor, of the formal establishment of an Inter-Allied Court by Treaty for this purpose. On the other hand, His Majesty's Government fully appreciate that some Allied countries feel that for constitutional and other reasons it would be difficult for them to ensure in a satisfactory manner the trial of at any rate all cases in which they were concerned in their national courts, as contemplated in the Moscow Declaration. In such cases the proposal made by your Commission for the establishment of mixed military courts might well afford a satisfactory solution of this difficulty.

It should be plain, however, that this is not a matter in which His Majesty's Government would desire, even if it were possible, to adopt a definite position without previous consultation with the Government of the United States, particularly as the military operations in Western Europe are on a joint basis, and the Supreme Command is now in the hands of an American general. Moreover, until the two Governments had reached, at any rate in principle, some conclusion as to the desirability of establishing an Inter-Allied Court by treaty it was obviously impossible to pursue the suggestion made in your letter for the convocation of a conference to negotiate such a treaty. The matter has accordingly been the subject of full consultation with the Government of the United States, and as soon as the views of the two Governments have been definitely formed it is the desire of His Majesty's Government that the other Allied Governments concerned should be approached with a view to consultation as to the measures to be adopted.

Although the United Nations War Crimes Commission gave its final approval to the draft convention at a meeting on 3 October 1944, and the Chairman sent a copy of it to the British Foreign Secretary on 6 October 1944, discussion continued, at the next meeting of the Commission on 10 October 1944, on the question of whether or not the preparation for, and launching of, the existing war constituted a war crime and should be considered by the Commission as such. The influence of Lord Wright was apparent. He strongly argued that such acts should be classed as war crimes.<sup>76</sup>

The provisions in the draft convention whereby the paramount role in the functioning of the proposed United Nations War Crimes Court would be assumed by Great Britain and the first conference of the representatives of the signatory Powers to elect the judges of the proposed Court would be held in London (Article 2), were not calculated to gain support for the proposal by the political leaders and governmental officers of the United States of America. From 4 January 1945, the date of the letter of the British Foreign Secretary to the chairman of the Commission, the 'Bernays Plan', based on the concept of 'conspiracy/criminal organisation', dominated the discussions among the Allied Powers.<sup>76</sup>

## CONCLUSIONS

Three matters are clear from a survey of the development of the laws and customs of war in the period between 3 September 1939 and 8 May 1945, and in the next three months up to the signing of the London Agreement and Charter.

First, as is discussed in Chapter 6, American political and bureaucratic policies were the determining factors in the formulation of the principles upon which the London Agreement and Charter were based.

Second, Great Britain was, on the day of Germany's surrender on 8 May 1945, no closer to the development of practicable, concrete proposals for the trial of war criminals than it had been immediately after the cessation of hostilities in the First World War. In particular, British political leaders and their advisers had, at that date, failed to enunciate with any precision the principles of international law upon which they were to rely so strongly at Nuremberg. Thereby, they left the way open for the adoption and application of American policies which, almost exclusively, would become the basis for 'Nuremberg Law'. More importantly, the negative approach of the British Government, which had the benefit of the advice of such eminent jurists as Lord Simon and Lord Wright, left it open to the criticism that it was a party to the London Agreement and Charter more by default than by reason of its formulation of an appropriate legal basis for the trials.

Third, the material so far surveyed indicates that it could not be validly asserted that there 'were in existence any lex lata, or established and practised rules or principles of international law which in themselves were a sound legal foundation for the contentious provisions of the London Charter. But that is not to say that the London Charter lacked justification as a matter of law. Other factors were relevant, including the rights of the major Powers in a situation of Germany's unconditional surrender and the adaptation, from a jurisprudential viewpoint, of accepted principles of international law in unprecedented circumstances. Those factors will be examined in Chapter 18.



## NOTES

1. The indictment was presented to the International Military Tribunal at Berlin on 18 October 1945. (The principal sources to which reference is made in this chapter are: (a) History of the United Nations War Crimes Commission and the Development of the Laws of War, His Majesty's Stationery Office, London, 1948: hereinafter cited as History of U.N.W.C.C.; (b) Historical Survey of the Question of International Criminal Jurisdiction, United Nations - General Assembly, International Law Commission, New York, 1949: hereinafter cited as U.N.O. Historical Survey. The latter study was undertaken pursuant to General Assembly resolution 175 (II) instructing the Secretary-General to 'do the necessary preparatory work for the beginning of the activity of the International Law Commission, particularly with regard to the questions referred to it by the second session of the General Assembly ...' and to General Assembly resolution 260 (III) B requesting the International Law Commission to 'study the desirability and possibility establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions' and in carrying out this task to 'pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice'.)
2. Examples of such trials are given by Woetzel, pp. 17-27.
3. For example, the often cited case in 1474 of Sir Peter of Hagenbach, Governor of Breisach, the Upper Rhine: see Woetzel, pp. 19-22.
4. Ibid., p. 19.
5. Glueck, The Nuremberg Trial and Aggressive War, Alfred A. Knopf, New York, 1946, cites a case in a Pennsylvanian Court in 1784, Respublica v. De Longchamps, in which the defendant was convicted and sentenced to imprisonment and fine for insulting and threatening bodily harm to the Secretary of the French Legation. The Court said that the case 'must be determined on the principles of the law of nations (emphasis added by Glueck), which form a part of the municipal law of Pennsylvania; and, if the offences charged in the indictment have been committed, there can be no doubt that those laws have been violated'.
6. Judgment, International Military Tribunal (I.M.T.), His Majesty's Stationery Office, London, Cmd. 6964, p. 64.
7. History of U.N.W.C.C., pp. 24-29.
8. U.N.O. Historical Survey, pp. 7-8 and Appendix 1, pp. 47 - 52.
9. U.N.O., Historical Survey, Appendix 1, pp. 47-48, note 2: See the declaration of Baron Marschall von Bieberstein, who, speaking at the Hague Conference of 1907 with regard to submarine mines, used the following expressions: 'Military operations are not governed solely by stipulations of international law. There are other factors. Conscience, good sense, and the sense of duty imposed by the principles of humanity will be the surest guides for the conduct of sailors, and will constitute the most effective guarantee against abuses. The officers of the German Navy, I loudly proclaim it, will always fulfil in the strictest fashion the duties which emanate from the unwritten law of humanity and civilization'.
10. For the text see (1920) 14 A.J.I.L., pp. 95-154.
11. U.N.O. Historical Survey, pp. 8-9.
12. Ibid., p. 9.
13. Ibid., p. 10.
14. Idem.

15. Ibid., p. 11.
16. Records of the First Assembly of the League of Nations, 1920, tenth meeting of the Third Committee, p. 329.
17. Ibid., p. 764.
18. Idem.
19. Records of the First Assembly of the League of Nations, 1920, plenary meetings, pp. 744-745.
20. U.N.O. Historical Survey, p. 12.
21. History of U.N.W.C.C., pp. 41-43.
22. Ibid., p. 43.
23. Ibid., p. 44. Consideration of the Leipzig trials is deferred until later in this Chapter.
24. Ibid., p. 44, where it is asserted: 'It is, however, evident that this arraignment of the Kaiser was not based on a charge of a violation of existing law; the ex-Kaiser was charged, according to what the authors of the Treaty considered to be the then existing state of international law, with offences against moral, not legal provisions.' (emphasis added). Sed quaere. It is more probable that the drafting of the first paragraph of Article 227 was influenced by political considerations, in the light of public outrage at German atrocities during the First World War, rather than by any view of the Allied Powers with respect to 'the then existing state of international law'.
25. Ibid., p. 35, notes 1 and 2. The expression used in the Declaration to describe the massacres was, in the French text, 'contra l'humanite et la civilisation'.
26. Ibid., pp. 35-36.
27. Ibid., p. 43.
28. Ibid., p. 45.
29. Idem., and footnote 2.
30. A similar assertion in respect of Article 227 of the Treaty of Versailles relating to Kaiser Wilhelm II, Emperor of Germany, is made in History of U.N.W.C.C., p. 240. In the cited source there is reference to the following extract from the formal statement of the Allied and Associated Powers in a Reply to the German Delegation's observations and the Conditions of Peace, after the signature of the Treaty of Versailles on 28 June 1919 (British and Foreign State Papers, 1919, vol. 112, H.M.S.O., London, 1922, pp. 255-316, at p. 282): '... the public arraignment under Article 227 framed against the German ex-Emperor has not a juridical character as regards its substance, but only in its form. The ex-Emperor is arraigned as a matter of high international policy, as the minimum of what is demanded for a supreme offence against international morality, the sanctity of treaties and the essential rules of justice. The Allied and Associated Powers have desired that judicial forms, a judicial procedure and a regularly constituted tribunal should be set up in order to assure to the accused full rights and liberties in regard to his defence, and in order that the judgment should be of the most solemn judicial character'. The assertion in History of U.N.W.C.C., p. 240, is as follows: 'Thus it was made quite clear that the arraignment of the Kaiser was not based on a charge of a violation of the existing law, but that he had been charged, according to what: the authors of the Treaty considered to be the then existing state of international law, with offences against moral, not legal provisions. Nevertheless, Article 227 of the Versailles Treaty may be regarded as the precursor of Article 6 (a) of the Nuremberg Charter and of Article 5 (a) of the Tokyo Charter

respecting crimes against peace, with the important distinction that the crimes against peace under these two Charters are not merely contraventions of a moral code, but violations of legal provisions'. The reasoning in the cited passage is obscure. First, there is a disclaimer of reliance on 'legal provisions'; then there is an assertion that 'crimes against peace under these two Charters are ... violations of legal provisions'. Presumably, the argument advanced was based on the view of the author of the cited passage, Dr. Litawski, that the Articles of the Nuremberg Charter had the effect of prescribing 'legal provisions'. Such an argument appears to beg the essential question.

31. The brief summary of the Leipzig trials in this chapter is based on the discussion in History of U.N.W.C.C., pp. 46-52. In note (1) at p. 46, an acknowledgment is made of the article by M. de Baer included in Reports on the Punishment of War Criminals, published by the London International Assembly, London, 1943.
32. Ibid., p. 48.
33. Ibid., p. 51.
34. Ibid., p. 241.
35. Idem.
36. For the text of the relevant letters relating to the Dutch Government, see Revue du Droit International, 1920, vol. 8, p.40. As to the legal aspects of the case, see M. Lachs, War Crimes An Attempt to Define the Issues, London, 1945, pp. 57-58.
37. Walters, A History of the League of Nations, Vol. 1, pp. 218-219.
38. History of U.N.W.C.C., p. 55.
39. Idem.
40. Ibid., p. 56.
41. Ibid., p. 57.
42. The Pact of Paris is discussed in Chapter 18.
43. Op. cit., p. 60. Until 15 July 1934, only 19 nations had acceded to the General Act.
44. The history of the involvement of the League of Nations in attempts to end the Italo-Abyssinian war is discussed ibid., pp. 67-70.
45. Ibid., p. 70.
46. Idem.
47. Idem.
48. I.M.T. Judgment, p. 39.
49. History of U.N.W.C.C., pp. 71-74.
50. Ibid., p. 74.
51. League Year by Year, 1938, p. 73 et seq.

52. International Law Association (ILA), Report of the Thirtieth Conference, The Hague, vol. 1, p. 173.
53. The text of the resolution is reproduced in the Report of the ILA Thirty Third Conference, p. 74.
54. Report of the ILA Thirty Third Conference, pp. 110-111.
55. Report of the ILA Thirty Fourth Conference, p. 110.
56. U.N.O. Historical Survey, Appendix 4, pp. 61-70.
57. The treatment of the proposed draft statute by Miss Goold-Adams, who wrote Chapter IV of History of U.N.W.C.C., at p. 85, is scant. No reference is made to paragraph (a) of Article 21 or to any of the provisions of Article 24, whereby restrictions on the jurisdiction of the Court were proposed.
58. U.N.O. Historical Survey. Appendix 5, pp. 70-74
59. The proposals of Professor Pella received further consideration in 1926 and 1928 but were not taken up in official quarters. It is relevant in the context to point out that the Thirty Seventh Conference of the Inter-Parliamentary Union, in Rome in 1948, declared that the collectivity of States must adopt as soon as possible an international penal code and create an international penal court for the punishment of crimes against peace, war crimes and crimes against humanity, including in particular the crime of genocide'. (United Nations document A/C. 3/221, U.N.O. Historical Survey, p. 14, note 3). See also Appendix 5 to U.N.O. Historical Survey, *ibid.* Professor Pella revised the draft in 1946.
60. U.N.O. Historical Survey, p. 16.
61. *Ibid.* See also League of Nations, Official Journal, 15th Year, No. 11 (Part I), p. 1760.
62. *Idem*.
63. U.N.O. Historical Survey, Appendix 8, pp. 88-97.
64. *Ibid.*, Appendix 9A, p. 97.
65. *Ibid.*, document 9B, pp. 97-112.
66. *Ibid.*, p. 19.
67. *Ibid.*, pp. 19-20.
68. A detailed discussion of the history and activities of the United Nations War Crimes Commission is contained in Chapter 5.
69. Compiled by the United Nations War Crimes Commission, H.M. Stationery Office, London, 1948.
70. *Ibid.*, p. 3.
71. U.N.O. Historical Survey, Appendix 10, pp. 112-119.
72. History of U.N.W.C.C., p. 3.
73. For a more detailed examination, see *ibid.*, p. 399, pp. 442-450 and pp. 452-454.
74. *Ibid.*, p. 453.
75. *Ibid.*, pp. 453-454.

76. For a detailed discussion of minutes of meetings of the United Nations War Crimes Commission, see Chapter 5 and the references; to minutes therein.
77. See discussion in Chapter 6.

## CHAPTER 3

### THE RELATIONSHIP BETWEEN THE NUREMBERG INDICTMENT AND THE ELABORATION OF NATIONAL SOCIALIST DOCTRINES IN 'MEIN KAMPF' AND OTHER GERMAN WRITINGS, SPEECHES AND DOCUMENTS.

#### INTRODUCTION

It was fundamental to the strategy underlying the conspiracy Count in the indictment, that its 'central core' should be proved to have been the Nazi Party, established in 1920, and the political activities of Hitler and his associates thereafter.

Under the heading of 'Particulars of the nature and development of the common plan or conspiracy' in Count 1 of the indictment, there was a lengthy pleading containing particulars of the 'common objectives, methods and doctrinal techniques' of the alleged conspiracy. An extract from the pleading is reproduced in an Annex to this Chapter.

In its Judgment, the Nuremberg Tribunal linked the public pronouncements of Hitler in the early 1920s concerning the aims and objectives of the Nazi Party with several of the groups of crimes charged in the indictment. The Tribunal identified the following five points' in the platform of the Party, from its inception as the successor of the German Labour Party until it was dissolved in 1945, as relevant to the changes in the indictment:<sup>1</sup>

Point 1. We demand the unification of all Germans in the Greater Germany, on the basis of the right of a self determination all of peoples.

Point 2. We demand equality of rights for the German people in respect to the other nations; abrogation of the peace treaties of Versailles and Saint Germain.

Point 3. We demand land and territory for the sustenance of our people, and the colonisation of our surplus population.

Point 4. Only a member of the race can be a citizen. A member of the race can only be one who is of German blood, without consideration of creed. Consequently no Jew can be a member of the race

...

Point 22. We demand abolition of the mercenary troops and formation of a national army.

The Tribunal emphasised the public utterances of Hitler. It said:<sup>2</sup>

Of those aims, the one which seems to have been regarded as the most important, and which figures in almost every public speech, was the removal of the 'disgrace' of the Armistice and the restrictions of the peace treaties of Versailles and Saint Germain. In a typical speech at Munich on 13 April 1923, for example, Hitler said with regard to the Treaty of Versailles:

The treaty was made in order to bring twenty million Germans to their deaths, and to ruin the German nation

... At its foundation our movement formulated three demands:

1. Setting aside of the Peace Treaty.
2. Unification of all Germans.
3. Land and soil to feed our nation.

The foundation of the Tribunal's judgment in respect of substantial parts of the indictment was its acceptance, as relevant evidence, of the statements of Hitler and his adherents in which they expounded their objectives, although not always the methods by which they intended to achieve them. The Tribunal stated:<sup>3</sup>

The demand for the unification of all Germans in the Greater Germany was to play a large part in the events preceding the seizure of Austria and Cechoslovakia; the abrogation of the Treaty of Versailles was to become a decisive motive in attempting to justify the policy of the German Government; the demand for land was to be the justification for the acquisition of 'living space' at the expense of other nations; the expulsion of the Jews from membership of the race of German blood was to lead to the atrocities against the Jewish people; and the demand for a national army was to result in measures of rearmament on the largest possible scale, and ultimately to war.

The admission of evidence of the nature described above was not, because of the allegations in the indictment, inconsistent with the ruling of the President during the presentation of the case for the defendant Hess. The argument of his counsel was that the Versailles Treaty was signed by Germany under duress and therefore was not binding on Germany as a state. The ruling was that 'evidence as to the injustice of the Versailles Treaty or whether it was made under duress is inadmissible and it [the Tribunal] therefore rejects Volume 3 of the documents on behalf of the defendant Hess'.<sup>4</sup>

#### THE DISCLOSURES IN 'MEIN KAMPF'

Following the abortive Munich putsch on 8 November 1923, when Hitler and some of his followers attempted to organise a march on Berlin, Hitler was tried for high treason, convicted and sentenced to imprisonment. While in prison, he wrote Mein Kampf, published in 1925. Some of the most striking extracts from the book are reproduced below for the purpose of establishing that Hitler did not conceal his political views or intentions, all of which he pursued, and in most of which he succeeded, until the tide turned in 1943. However, his political pronouncements had no more significance, in a legal sense, than the political statements of the Allied Powers in the Moscow Declaration of 30 October 1943, although it has been claimed that the Declaration had some basis in international law for the establishment of the Nuremberg Tribunal (see Chapter 18).<sup>5</sup>

Article 21 of the Nuremberg Charter provided that 'The Tribunal shall not require proof of facts of common knowledge but shall take judicial notice thereof. ...'

In opening the United States case for the prosecution on Count 1, Major F.B. Wallis, Assistant Trial Counsel, said:<sup>6</sup>

The main objectives of the Party, which are fastened upon the defendants and their co-conspirators by reason of their membership in, or knowing adherence to the Party, were openly and notoriously avowed. They were set out in the Party program of 1920, were publicized in Mein Kampf and in Nazi literature generally, and were obvious from the continuous pattern of publication of the Party from the date of its founding.

Now two consequences, of importance in the Trial of this case, derive from the fact that the major objectives of the Party were publicly and repeatedly proclaimed:

First, the Court may take judicial notice of them. [Article 21 of the Charter].

Second, the defendants and their co-conspirators cannot be heard to deny them or to assert that they were ignorant of them.

The Prosecution offers proof of the major objectives of the Party - and hence of the objectives of the conspiracy - only to refresh or implement judicial recollection.

Extracts from Mein Kampf upon which the American prosecution focussed attention included:<sup>7</sup>

One must take the point of view, coolly and soberly, that it certainly cannot be the intention of Heaven to give one people fifty times as much space (Grund und Boden) on this earth as to another. One should not permit himself to be diverted in this case by political boundaries from the boundaries of eternal justice ... The boundaries of 1914 do not mean anything for the future of the German nation. They did not represent either a defense of the past nor would they represent a power in the future. The German people will not obtain either its inner compactness by them, nor will its nutrition be secured by them, nor do these boundaries appear from a military standpoint as appropriate or even satisfactory.<sup>8</sup>

...

If one wanted territory in Europe, this could be done on the whole at the expense of Russia, and the new Reich would have to set out to march over the road of the former Knights, in order to give soil to the German plow by means of the German sword and to give daily bread to the nation.<sup>9</sup>

...

If this earth really has space (Raum) for all to live in, then we should be given the territory necessary. Of course one will not give that gladly. Then, however, the right of self-preservation comes into force; that which is denied to kindness, the fist will have to take. If our forefathers had made their decisions dependent on the same pacifistic nonsense as the present, then we would possess only a third of our present territory ... In contrast, we, National Socialists, have to hold on steadily to our foreign political goals, namely, to secure on this earth the territory due to the German people. And this action is the only one which will make bloody sacrifice before God and our German posterity appear justified.<sup>10</sup>

...

Thus the question of how to regain German power is not: How shall we manufacture arms?, but: How do we create the spirit which enables a nation to bear arms? If this spirit governs a people, the will finds thousands of ways, each of which ends with a weapon!<sup>11</sup>

...

The lack of a great creative idea means at all times an impairment of the fighting spirit. The conviction that it is right to use even the most brutal weapons is always connected with the existence of a fanatical belief that it is necessary that a revolutionary new order of this earth should become victorious. A movement which does not fight for these highest aims and ideals will therefore never resort to the ultimate weapon ... It is not possible to undertake a task half-heartedly or hesitatingly if its execution seems to be feasible only by expending the very last ounce of energy ... One had to become clear in one's mind that this goal [that is, acquisition of new territory in Europe] could be achieved by fight alone and then had to face this armed conflict with calmness and composure.<sup>12</sup>

In a submission to the Tribunal, Major F. Elwyn Jones, Junior Counsel for the United Kingdom, said:<sup>13</sup>

This book, Mein Kampf, might be described as the blueprint of Nazi aggression. Its whole tenor and content enforce the Prosecution's submission that the Nazi pursuit of aggressive designs was no mere accident arising out of the immediate political situation in Europe and the world which existed during the period of Nazi power. Mein Kampf establishes unequivocally that the use of aggressive war to serve their aims in foreign policy was part of the very creed of the Nazi Party.

Colonel Y.V. Pokrovsky, Deputy Chief Prosecutor for the U.S.S.R., cited the following extract from Mein



Kampf:

The movement eastwards is continuing, even though Russia must be erased from the list of European Powers.<sup>14</sup>

It is of interest to contrast with the language of prosecution counsel the evidence of the defendant Schacht, who was acquitted on both the counts under which he was charged (Counts 1 and 2). He said:<sup>15</sup>

As far as the book Mein Kampf is concerned, my judgment has always been the same from the very beginning as it is today. It is a book written in the worst kind of German, propaganda of a man who was strongly interested in politics, not to say a fanatical, half educated man, which to me Hitler has always been. In the book Mein Kampf and in part also in the Party program there was one point which worried me a great deal, and that was the absolute lack of understanding for all economic problems. ... as regards foreign policy Mein Kampf contained, in my opinion, a great many mistakes, because it always toyed with the idea that within the continent of Europe the living space for Germany ought to be extended. And if nevertheless I did co-operate later on with a National Socialist Reich Chancellor, then it was for the very simple reason that expansion of the German space toward the East was in the book made specifically dependent upon the approval of the British Government. Therefore, to me, believing that I knew British policy very well, this seemed Utopian and there was no danger of my taking these theoretical extravagances of Hitler any more seriously than I did. It was clear to me that every territorial change on European territory attempted by force would be impossible for Germany, and would not be approved by the other nations.

#### FURTHER PUBLIC DECLARATIONS OF NAZI POLICIES

The Nazis gave early public notice of their intent upon seeking in the East the Lebensraum to which they claimed they were entitled. The accused Rosenberg in particular was insistent that Russia would have to 'move over' to make way for German living space. He said:<sup>16</sup>

The understanding that the German nation, if it is not to perish in the truest sense of the word, needs ground and soil for itself and its future generations, and the second sober perception that this soil can no more be conquered in Africa, but in Europe and first of all in the East these organically determine the German foreign policy for centuries.

The crystallisation of Hitler's plans was manifest when, at the Nuremberg Party Congress in 1934, he said:<sup>17</sup>

Only a part of the people will be really active fighters. But they were the fighters of the National Socialist struggle. They were the fighters for the National Socialist revolution, and they are the millions of the rest of the population. For them it is not sufficient to confess: 'I believe', but to swear: 'I fight'.

The extract cited above was expressive of the same theme in the Party Organisation Book:<sup>18</sup>

The Party includes only fighters who are ready to accept and sacrifice everything in order to carry through the National Socialist ideology.

At the trial of Reichswehr officers at Leipzig in September 1930, Hitler gave evidence<sup>19</sup>

Germany is being strangled by Peace Treaties. ... The National Socialists do not regard the Treaty [Treaty of Versailles] as a law, but as something forced upon us. We do not want future generations, who are completely innocent, to be burdened by this. When we fight this with all means at our disposal, then we are on the way to a revolution.

President of the Court: 'Even by illegal means?'

Hitler: 'I will declare here and now, that when we have become powerful (gesiegt haben), then we shall fight against the Treaty with all the means at our disposal, even from the point of view of the world, with illegal means'.

In a separate document tendered at the Nuremberg trial, Hitler said in relation to rearmament:<sup>20</sup>

It is impossible to build up an army and give it a sense of worth if the object of its existence is not the preparation for war. Armies for the preservation of peace do not exist; they exist only for the triumphant- exertion of war.

The accused Rosenberg was one of the most vigorous exponents of Nazi doctrine. He is thus recorded:<sup>21</sup>

The meaning of world history has radiated out from the north over the whole world, borne by a blue-eyed blond race which in several great waves determined the spiritual face of the world ...

We stand today before a definitive decision. Either through a new experience and cultivation of the old blood, coupled with an enhanced fighting will, we will rise to a purificatory action, or the last Germanic-western values of morality and state-culture shall sink away in the filthy human masses of the big cities, become stunted on the sterile burning asphalt of a bestialized inhumanity, or trickle away as a morbid agent in the form of emigrants bastardizing themselves in South America, China, Dutch East India, Africa.

A new faith is arising today: the myth of the blood, the faith, to defend with the blood the divine essence of man. The faith, embodied in clearest knowledge that the Nordic blood represents that mystery which has replaced and overcome the old sacraments.

## THE FUEHRER PRINCIPLE

The Fuehrerprinzip (Fuehrer Principle) was a basic element of Nazi ideology. Its essential features were thus officially expressed:<sup>22</sup>

Complete and total authority is vested in the Fuehrer.

The Fuehrer Principle requires a pyramidal organization structure in its details as well as in its entirety.

The Fuehrer is at the top.

He nominates the necessary leaders for the various spheres of work of the Reich's direction, the Party apparatus and the State administration.

He shapes the collective will of the people within himself and he enjoys the political unity and entirety of the people in opposition to individual interests.

The Fuehrer unites in himself all the sovereign authority of the Reich; all public authority in the state

as well as in the movement is derived from the authority of the Fuehrer. We must speak not of the state's authority but of the Fuehrer's authority -if- we wish to designate the character of the political authority within the Reich correctly. The state does not hold political authority as an impersonal unit but receives it from the Fuehrer as the executor of the national will. The authority of the Fuehrer is complete and all-embracing; it unites in itself all the means of political direction; it extends into all fields of national life; it embraces the entire people, which is bound to the Fuehrer in loyalty and obedience. The authority of the Fuehrer is not limited by checks and controls, by special autonomous bodies or individual rights, but it is free and independent, all-inclusive and unlimited.

The Fuehrer-Reich of the (German) people is founded on the recognition that the true will of the people cannot be disclosed through parliamentary votes and plebiscites but that the will of the people in its pure and uncorrupted form can only be expressed through the Fuehrer.

And in amplification of this ideology<sup>23</sup>

Thus at the head of the Reich, stands a single Fuehrer, who in his personality embodies the idea which sustains all and whose spirit and will therefore animate the entire community.

Numerous documents were tendered at Nuremberg in explanation of what was an entrenched phenomenon, described as the 'Fuehrer Principle'. Examples are:

... It is not mere chance that millions in Germany are of the holy conviction that National Socialism is more than politics, that in it the word and the will of God proclaim itself, that the bulwark it has created against Bolshevism was conceived on higher inspiration as the last salvation of Occidental culture/before the threat of Asiatic atheism (extract from Joseph Goebbels, 'From Kaiserhof to Reich Chancellery', 1934, p. 12; Nuremberg Trial, document No. 2373-PS).

It is with pride that we see that one man is kept above all criticism--that is the Fuehrer. The reason is that everyone feels and knows: he was always right and will always be right. The National Socialism of us all is anchored in the uncritical loyalty, in the devotion to the Fuehrer that does not ask for the wherefore in the individual case, in the tacit performance of his commands. We believe that the Fuehrer is fulfilling a divine mission to German destiny! This belief is beyond challenge. (Hess, Speeches, Munich, 1928, p. 25; Radio speech at Cologne, 25 June 1934; Nuremberg Trial, *ibid.*)

As an extension of the doctrine of respondent superior, the 'Fuehrer Principle' was argued as a special plea by some of those accused at Nuremberg, including the proposition that the obedience exacted under the principle was unconditional and absolute, regardless of the legality or illegality of the order. The oath taken by political leaders (Politische Leiter) yearly was-<sup>24</sup>

I pledge eternal allegiance to Adolf Hitler. I pledge unconditioned obedience to him and the Fuehrers appointed by him.

The Nuremberg Tribunal dealt condignly with that plea when it stated:<sup>25</sup>

The argument that ... common planning cannot exist where there is complete dictatorship is

unsound. A plan in the execution of which a number of persons participate is still a plan, even though conceived by only one of them; and those who execute the plan do not avoid responsibility by showing that they acted under the direction of the man who conceived it. Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing. That they were assigned to their tasks by a dictator does not absolve them from responsibility for their acts. The relation of leader and follower does not preclude responsibility here any more than it does in the comparable tyranny of organised domestic crime.

To the same effect was the observation of the President of the Tribunal at a later stage (1947)<sup>26</sup>:

It makes no difference whether sovereign power is vested in a dictator or in a parliament; unless the orders of either are to be controlled by the law of nations there is no security for the nations of the world.

A less general, and more positive, basis for rejecting the 'Fuehrer Principle' at Nuremberg than the statements in the extracts cited above is that the law of nations would disintegrate if it was bound to recognise the bizarre dictates of a particular national ideology not recognised by any established tenet of positive international law.

## THE JUDGMENT OF THE INTERNATIONAL MILITARY TRIBUNAL

The International Tribunal stated in its judgment:<sup>27</sup>

It must be remembered that Mein Kampf was no mere private diary in which the secret thoughts of Hitler were set down. Its contents were rather proclaimed from the house-tops. It was used in the schools and Universities and among the Hitler Youth, in the SS and the SA, and among the German people generally, even down to the presentation of an official copy to all newly-married people. By the year 1945 over 62 million copies had been circulated. The general contents are well known. Over and over again Hitler asserted his belief in the necessity of force as the means of solving international problems, as in the following quotation:

'The soil on which we now live was not a gift bestowed by Heaven on our forefathers. They had to conquer it by risking their lives. So also in the future, our people will not obtain territory, and therewith the means of existence, as a favour from any other people, but will have to win it by the power of a triumphant sword'.

Mein Kampf contains many such passages, and the extolling of force as an instrument of foreign policy is openly proclaimed.

The precise objectives of this policy of force are also set forth in detail. The very first page of the book asserts that 'German-Austria must be restored to the great German Motherland,' not on economic grounds, but because 'people of the same blood should be in the same Reich.'

The restoration of the German frontiers of 1914 is declared to be wholly insufficient, and if Germany is to exist at all, it must be as a world power with the necessary territorial magnitude.

Mein Kampf is quite explicit in stating where the increased territory is to be found:

Therefore we National Socialists have purposely drawn a line through the line of conduct followed by pre-war Germany in foreign policy. We put an end to the perpetual Germanic march towards the South and West of Europe, and turn our eyes towards the lands of the East. We finally put a stop to the colonial and trade policy of the pre-war times, and pass over to the territorial policy of the future.

But when we speak of new territory in Europe today, we must think principally of Russia and the border states subject to her.

Mein Kampf is not to be regarded as a mere literary exercise, or as an inflexible policy or plan incapable of modification.

Its importance lies in the unmistakable attitude of aggression revealed throughout its pages.

## CONCLUSION

It has been shown in this chapter that the basic aims and objectives of Nazi Germany were proclaimed to the world before the signature of the 1928 Pact of Paris. When Hitler became Chancellor in 1933 the irrelevance, so far as Germany was concerned, of all 'non-aggression' pacts and treaties which could have impeded the attainment of those aims and objectives was manifest.

Such fact did not constitute a basis for exculpation of the Nuremberg defendants; neither, however, was it used by the Tribunal as a basis for conviction. As is pointed out by Professor Woetzel in a discussion of the attitude of the Tribunal to the evidence of the proclaimed objectives of Hitler and his associates:<sup>28</sup>

The programme of the Nazi Party as laid down in 1920, and the opinions expressed in Hitler's Mein Kampf, cannot be regarded as planning which is criminal in the sense of the delicate. 'The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan' [Judgment, I.M.T., p. 43]. Furthermore, measures aimed at strengthening the Nazi Party cannot be regarded as criminal in the meaning of a conspiracy to wage aggressive war.

The significance, as a matter of law, of the examination of Nazi doctrine as pleaded at Nuremberg was twofold. First, it enabled the prosecution to adduce evidence relating to acts and events, within the vast ambit of the indictment, over a period of 25 years (1920 to 1945). Second, it furnished a background for the proof of the 'common plan or conspiracy' the theme of which permeated the indictment, the trial and the judgment.<sup>29</sup>

## NOTES

1. Judgment, I.M.T., p. 4.
2. Ibid.
3. Ibid.
4. Nuremberg Trial, I.M.T., Vol. X, p. 90. There was a difference, from the viewpoint of admissible evidence, between the allegations in the indictment of the abrogation of the Treaty of Versailles and the diverse personal opinions concerning its 'injustice'. It seems that these opinions were the reason for the rejection by the Tribunal of the volume of documents.
5. See, for example, Robert H. Jackson, Report to the President, Department of State, United States of America, Publication 2420, European Series 10, United States Government Printing Office, Washington, 1945.
6. Nuremberg Trial, I.M.T., Opening Address by Assistant Trial Counsel for the United States, (by Wallis), Vol. II, pp. 180-181.
7. Nazi Conspiracy and Aggression, (eight volumes and two supplementary volumes), Office of United States Chief of Counsel for Prosecution of Axis Criminality, United States Government Printing Office, Washington, 1946, approved by Mr. Justice Jackson, Chief of Counsel, Nuremberg, 20 January 1946, (hereinafter cited as Nazi Conspiracy and Aggression). The series has been officially described as 'A Collection of Documentary Evidence and Guide Materials Prepared by the American and British Prosecution Staffs for Presentation before the International Military Tribunal at Nuremberg, Germany'.
8. Adolf Hitler, Mein Kampf, 41st edn., Munich, 1933, pp. 738-739 (United States document tendered in evidence in the Nuremberg trial, No. 2760-A-PS), (hereinafter cited as Mein Kampf).
9. Nazi Conspiracy and Aggression, op. cit., Vol. 1, Chapter VII, p. 187.
10. Mein Kampf, op. cit., pp. 738-740.
11. Ibid., pp. 365-366.
12. United States document tendered in evidence at the Nuremberg trial, No. 2760-A-PS.
13. Nuremberg Trial, I.M.T., Vol. IV, pp. 519-520. At pp. 520-527, Major Elwyn Jones cited a number of extracts from Mein Kampf and concluded: 'Events have proved in the blood and misery of millions of men, women and children that Mein Kampf was no mere literary exercise to be treated with easy indifference, as unfortunately it was treated before the war by those who were imperilled, but was the expression of a fanatical faith in force and fraud as the means to Nazi dominance in Europe, if not in the whole world. The Prosecution's submission is that accepting and propagating the jungle philosophy of Mein Kampf, the Nazi confederates who are indicted here deliberately pushed our civilization over the precipice of war.'
14. Mein Kampf, 1930 edition, p. 732.
15. Nuremberg Trial, I.M.T., Vol. XII, p. 422.
16. National Socialist Monthly, May 1932, p. 199; Nuremberg Trial, document No. 2777-PS.
17. Hitler, Speech at Party Congress, Nuremberg, 1934; Nuremberg trial, document No. 2775-PS.

18. Nazi Party Organisation Book, 4th ed., 1937, p. 86.
19. Hitler, Testimony before the Court for High Treason, Leipzig, September 1930, published in Frankfurter Zeitung, 26 September 1931, Nuremberg Trial, document No. 2512-PS.
20. Nuremberg Trial, document No. 2541-PS.
21. U.S. State Department, National Socialism, published by U.S. Government Printing Office, 1943; Nuremberg Trial, document No. 2771-PS.
22. Ibid., Nuremberg Trial, document No. 2771-PS.
23. Dr. R. Kluge and Dr. H. Krueger, Constitution and Administration in the Third Reich, 1937.
24. Nuremberg Trial, document No. 1893-PS.
25. Judgment, I.M.T., pp. 43-44.
26. Lawrence (Lord Oaksey), 'The Nuremberg Trial', Int. Aff., Vol. 23 (1947), pp. 151-159.
27. Judgment, I.M.T., pp. 13-14.
28. Woetzel, pp. 160-161.
29. See Chapter 8 for a critical analysis of Count 1 of the Nuremberg indictment insofar as it charged all the defendants with participation in the formulation or execution of a common plan or conspiracy to commit crimes against peace, war crimes and crimes against humanity, as defined in the Charter of the Tribunal.

## ANNEXE TO CHAPTER 3:

## PARTICULARS OF THE NATURE AND DEVELOPMENT OF THE COMMON PLAN OR CONSPIRACY

## (A) NAZI PARTY AS THE CENTRAL CORE OF THE COMMON PLAN OR CONSPIRACY

In 1921 Adolf Hitler became the supreme leader or Fuehrer of the Nationalsozialistische Deutsche Arbeiterpartie (National Socialist German Workers Party), also known as the Nazi Party, which had been founded in Germany in 1920. He continued as such throughout the period covered by this indictment. The Nazi Party, together with certain of its subsidiary organizations, became the instrument of cohesion among the defendants and their co-conspirators and an instrument for the carrying out of the aims and purposes of their conspiracy. Each defendant became a member of the Nazi Party and of the conspiracy, with knowledge of their aims and purposes, or, with such knowledge, became an accessory to their aims and purposes at some stage of the development of the conspiracy.

## (B) COMMON OBJECTIVES AND METHODS OF CONSPIRACY

The aims and purposes of the Nazi Party and of the defendants and divers other persons from time to time associated as leaders, members, supporters or adherents of the Nazi Party (hereinafter called collectively the "Nazi conspirators") were, or came to be, to accomplish the following by any means deemed opportune, including unlawful means, and contemplating ultimate resort to threat of force, force and aggressive war; (i) to abrogate and overthrow the Treaty of Versailles and its restrictions upon the military armament and activity of Germany; (ii) to acquire the territories lost by Germany as the result of the World War of 1914-1918 and other territories in Europe asserted by the Nazi conspirators to be occupied principally by so-called "racial Germans"; (iii) to acquire still further territories in continental Europe and elsewhere claimed by the Nazi conspirators to be required by the "racial Germans" as "Lebensraum," or living space, all at the expense of neighbouring and other countries. The aims and purposes of the Nazi conspirators were not fixed or static but evolved and expanded as they acquired progressively greater power and became able to make more effective application of threats of force and threats of aggressive war. When their expanding aims and purposes became finally so great as to provoke such strength of resistance as could be overthrown only by armed force and aggressive war, and not simply by the opportunists methods theretofore used, such as fraud, deceit, threats, intimidation, fifth column activities and propaganda, the Nazi conspirators deliberately planned, determined upon and launched their aggressive wars and wars in violation of international treaties, agreements and assurances by the phases and steps hereinafter more particularly described.

## (C) DOCTRINAL TECHNIQUES OF THE COMMON PLAN OR CONSPIRACY

To incite others to join in the common plan or conspiracy, and as a means of securing for the Nazi conspirators the highest degree of control over the German community, they put forth, disseminated, and exploited certain doctrines, among others, as follows:

1. That persons of so-called 'German blood' (as specified by the Nazi conspirators) were a "master race" and were accordingly entitled to subjugate, dominate or exterminate other "races" and peoples;
2. That the German people should be ruled under the Fuehrerprinzip (leadership principle) according to which power was to reside in a Fuehrer from whom sub-leaders were to derive authority in a hierarchical order, each sub-leader to owe unconditional obedience to his immediate superior but to be absolute in his own sphere of jurisdiction; and the power of the leadership was to be unlimited, extending to all phases of public and private life;
3. That war was a noble and necessary activity of Germans;
4. That the leadership of the Nazi Party, as the sole bearer of the foregoing and other doctrines of the Nazi Party, was entitled to shape the structure, policies and practices of the German State and all



related institutions, to direct and supervise the activities of all individuals within the State, and to destroy all opponents.

## CHAPTER 4 WARNINGS TO THE AXIS POWERS

### INTRODUCTION

During the early months of World War II, it became apparent that the Nazi Government and its armed forces, both in occupied countries and in Germany, were committing atrocities and acts of brutality on a scale which had never occurred in the history of mankind. The revelations led to a number of public statements by leaders of the Allied and Associated Powers concerning their intended action against those responsible. The principal statements are referred to in this Chapter.

An analysis of the declarations shows a political rather than a legal reaction to the horrors which were the result of the policies of the Third Reich.

By October 1943, the London International Assembly, although it was not an official body, had completed the final draft of documentation to establish an International Criminal Court, which was intended to apply a 'codified international criminal law, agreed by the United Nations'.<sup>1</sup>

In the London Agreement of 8 August 1945 the word 'jurisdiction' was expressly used. Derived from the Latin *jurisdictio*, meaning a 'declaration of law', the use of the word may be perceived as a reliance on established legal principles. It is therefore relevant to examine the nature and extent of the warnings in respect of criminal proceedings which the major Allied Powers and governments in exile publicly proclaimed would be taken.

### INITIAL PUBLIC STATEMENTS OF CONDEMNATION

The first major public revelation of the enormity of the Nazi crimes predictably was by the Governments in exile of Poland and Czechoslovakia. In a joint statement in November 1940, they declared:

... the violence and cruelty to which their two countries had been subjected was unparalleled in human history. Among the brutalities instanced were: expulsion of population, banishment of hundreds and thousands of men and women to forced labour in Germany, mass executions and deportations to concentration camps, plundering of public and private property, extermination of the intellectual class and of cultural life, spoliation of treasures of science and art and the persecution of all religious beliefs.<sup>2</sup>

A month later, the Polish Government, in a separate statement, denounced the German policy of denationalisation in Poland as being contrary to international law, and, in particular, to the Hague Convention of 1907 on the rights and usages of land warfare, to which the Third Reich had adhered.<sup>3</sup>

World War II was in its third year before there was any significant publication by any of the major Powers to condemn the enormity of atrocities committed by the Germans in occupied territory. On 25 October 1941 the United States of America was a neutral nation. However, on that day simultaneous declarations were made by the President of the United States and the Prime Minister of Great Britain.

The text of President Roosevelt's message was:

The practice of executing scores of innocent hostages in reprisal for isolated attacks on Germans in countries temporarily under the Nazi heel revolts a world already inured to suffering and brutality. Civilized peoples long ago adopted the basic principle that no man should be punished for the deed of another. Unable to apprehend the persons involved in these attacks, the Nazis characteristically slaughter fifty or a hundred innocent persons. Those who would 'collaborate' with Hitler and try to appease him cannot ignore this ghastly warning.

The Nazis might have learned from the last war the impossibility of breaking men's spirit by terrorism. Instead, they develop their Lebensraum and new order by depths of frightfulness which even they have never approached before. These are the acts of desperate men who know in their hearts that they cannot win. Frightfulness can never bring peace to Europe. It only sows the seeds of hatred which will one day bring frightful retribution.

On the same day Mr. Winston Churchill issued a declaration from No. 10 Downing Street as follows:

His Majesty's Government associate themselves fully with the sentiments of horror and condemnation expressed by the President of the United States upon the Nazi butcheries in France. These cold-blooded executions of innocent people will only recoil upon the savages who order and execute them.

The butcheries in France are an example of what Hitler's Nazis are doing in many other countries under their yoke. The atrocities in Poland, in Yugoslavia, in Norway, in Holland, in Belgium and above all behind the German fronts in Russia, surpass anything that has been known since the darkest and most bestial ages of mankind. They are but a foretaste of what Hitler would inflict upon the British and American peoples if only he could get the power.

Retribution for these crimes must henceforward take its place among the major purposes of the war.

A more legalistic approach was adopted by the Soviet Foreign Minister, Mr. Molotov, who, on 7 November 1941, sent a Note to all nations which had diplomatic relations with the USSR. The Note asserted that, among other atrocities, Red Army prisoners had been tortured and crushed by tanks, others had been burned at the stake, others had been left to die of disease or had been exterminated by starvation, wounded in hospital had been bayoneted, and nurses and other women medical assistants had been raped. The Note concluded:

All these facts are an outrageous violation by the German Government of the elementary principles and regulations of international law and of the International Agreement signed by representatives of Germany itself.

In bringing these horrible facts to the notice of all countries with which the Soviet Union has diplomatic relations, the Soviet Government indignantly protests before the whole world against the barbaric violation by the German Government of the elementary rules of international law.

The Soviet Government indignantly protests against the brutal attitude of the German Authorities towards Red Army prisoners, an attitude which violates the most elementary rules of human morality. It lays all the responsibility for these inhuman actions of the German military and civil authorities on the criminal Hitlerite Government.<sup>4</sup>

A further Note was similarly circulated by the Soviet Government on 6 January 1942. It repeated the protest against German brutality and declared that it held the German Government responsible for crimes committed by German troops.<sup>5</sup>

With the establishment of the body known as the Inter-Allied Conference on the Punishment of War Crimes, the name of which was later changed to the Inter-Allied Commission on the Punishment of War Crimes, the way was open for an attempt to imprint on the political condemnation of the German Government a legal basis for the threatened retribution.

On 13 January 1942 representatives of the Governments of Belgium, Czechoslovakia, France, Greece, Luxembourg, Norway, the Netherlands, Poland and Yugoslavia issued the following declaration (commonly referred to as the Declaration of St. James's):

Whereas Germany, since the beginning of the present conflict which arose out of her policy of aggression, has instituted in the occupied countries a regime of terror characterised amongst other things by imprisonments, mass expulsions, the execution of hostages and massacres,

And whereas these acts of violence are being similarly committed by the Allies and Associates of the Reich and, in certain countries, by the accomplices of the occupying Power,

And whereas international solidarity is necessary in order to avoid the repression of these acts of violence simply by acts of vengeance on the part of the general public, and in order to satisfy the sense of justice of the civilised world,

Recalling that international law, and in particular the Convention signed at The Hague in 1907 regarding the laws and customs of land warfare, do not permit belligerents in occupied countries to commit acts of violence against civilians, to disregard the laws in force or to overthrow national institutions,

....

- (1) affirm that acts of violence thus inflicted upon the civilian populations have nothing in common with the conceptions of an act of war or a political crime as understood by civilised nations,
- (2) take note of the declarations made in this respect on 25th October 1941 by the President of the United States of America and by the British Prime Minister,
- (3) place among their principal war aims the punishment, through the channel of organised justice, of those guilty of or responsible for these crimes, whether they have ordered them, perpetrated them or participated in them,
- (4) resolve to see to it in a spirit of international solidarity that (a) those guilty or responsible, whatever their nationality, are sought out, handed over to justice and judged, (b) that the sentences pronounced are carried out.

It is apparent from a consideration of the speeches made at the time of the Declaration of St. James's,<sup>6</sup> that there was no clear perception at that time of the precise legal basis for the trial and punishment of war criminals. For example, there were references to 'a criminal campaign well thought out and prepared in advance down to the smallest detail'; the words '... contrary to law, the moral law as well as national and international law', were used; and the Prime Minister of Greece, M. Tsouderos, claimed that by the Declaration 'a new principle of national penal law has come into being'.

The first reference to a body such as the Nuremberg International Military Tribunal appeared in a Note dated 14 October 1942 by the Soviet Government in reply to a Note which, between July and September 1942, was presented on behalf of the nine signatories of the Declaration of St. James's to the British and Soviet Governments, the President of the United States and the Holy See. The reply of the Soviet Government included the following:

The Soviet Government consider it essential to hand over without delay to the courts of the special international tribunal and to punish according to all the severity of the criminal code, any of the leaders of Fascist Germany who, in the course of the war, have fallen into the hands of States fighting against Hitlerite Germany.

There are two remarkable aspects of the Soviet Note in reply. First, the extract cited assumes the future existence of a 'special international tribunal'; second, the reference to 'the criminal code' is vague and nonspecific.

Two unofficial bodies were established late in 1941 and each contributed to the growing realisation that an appropriate framework for dealing with war criminals simply did not exist.

The first was the London International Assembly, created under the auspices of the League of Nations Union by Viscount Cecil of Chelwood. The Assembly established a Commission in March 1942 to study a number of matters associated with war crimes. There is no evidence that the work of either the Assembly or the Commission produced tangible results. However, one aspect of their work is significant. It is reflected in the following extract: from the History of the United Nations War Crimes Commission and the Development of the Laws of War, (p. 103):

The Assembly considered that a codified international criminal law, agreed by the United Nations, would be the law which should be applied by the court. Failing such a codification, the court's decisions were to be governed by international custom, treaties, the generally accepted principles of criminal law, as well as judicial precedents and doctrine. The penalty to be imposed was at the discretion of the court.

The expression 'the court' was a reference to what was termed a 'Draft Convention for the Creation of an International Criminal Court', which the Commission had prepared in its final form by October 1943. The Assembly's consideration of the 'Draft Convention' appears naive, in that it was, by the end of 1943, an impracticable approach to believe that a codified international criminal law could be framed and agreed to by 'the United Nations' (that is, the Allied and Associated Powers) by the end of the war.

The second unofficial body which considered the general question of war crimes and related jurisdictional matters was the Cambridge Commission on Penal Reconstruction and Development, which comprised members of the Faculty of Law of Cambridge University and jurists from the occupied countries of Europe.

There is no evidence that the Cambridge Commission achieved anything specific. This is understandable, because its membership did not include official representatives from any of the warring nations. However, it made some contribution to the development of the concept of an international tribunal. It is significant that the Commission considered it necessary to urge the Allied Governments to establish or codify the relevant fundamental principles of international law. It seems clear that the eminent jurists who comprised the Commission were unable to assert that principles of international law existed which were adequate to form the jurisdictional basis for the trials of Axis war criminals.

Between October 1942 and October 1943, several official statements by Governments of the Allied nations committed them, on the successful end of the war, to a policy of the trial and punishment of Nazi war criminals.

## DEBATE IN THE HOUSE OF LORDS AND THE SIMULTANEOUS DECLARATION OF PRESIDENT ROOSEVELT, 7 OCTOBER 1942

By October 1942, the allied nations had clear evidence of the widespread inhuman conduct of members of the German Government and of the German armed forces, in the form of genocide, atrocities and bestial cruelty. On that day, Lord Maugham initiated a debate in the House of Lords, which enabled Lord Simon, the Lord Chancellor, to announce two major policy decisions of the British Government.

The first was the formation of a United Nations War Crimes Commission for the Investigation of War Crimes, the prime purpose of which would be the identification and naming, wherever possible, of the persons responsible for Nazi atrocities, and in particular of organised atrocities.<sup>7</sup>

The second announcement was that 'named criminals wanted for war crimes should be caught and handed over at

the time of, and as a condition of, The Armistice, with the right to require delivery of others as soon as the supplementary investigations are complete'.<sup>8</sup>

On the same day, President Roosevelt made the following statement:

I now declare it to be the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals.

With a view to establishing responsibility of the guilty individuals through the collection and assessment of all available evidence, this Government is prepared to co-operate with the British and other Governments in establishing a United Nations Commission for the Investigation of War Crimes.

The number of persons eventually found guilty will undoubtedly be extremely small compared to the total of enemy populations. It is not the intention of this Government or Governments associated with it to resort to mass reprisals. It is our intention that just and sure punishment shall be meted out to the ringleaders responsible for the organised murder of thousands of innocent persons and the commission of atrocities which have violated every tenet of the Christian faith.<sup>9</sup>

#### STATEMENT BY MR. EDEN IN THE HOUSE OF COMMONS, 17 DECEMBER 1942.

On 17 December 1942, in the wake of mounting reports of widespread Nazi atrocities and acts of genocide, especially against Jewish persons, the the British Foreign Secretary, Mr. Eden, made the following statement in the House of Commons:

The attention of the Governments of Belgium, Czechoslovakia, Greece, Luxembourg, the Netherlands, Norway, Poland, the USA, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and Yugoslavia, and the French Committee of National Liberation, has been drawn to numerous reports from Europe that the German authorities, not content to deny to persons of Jewish race in all the territories over which their barbarous rule has been extended the most elementary human rights, are now carrying into effect Hitler's oft-repeated intention to exterminate the Jewish people in Europe. From all the occupied countries Jews are being transported, in conditions of appalling horror and brutality, to Eastern Europe. In Poland, which has been made the principal Nazi slaughterhouse, the ghettos established by the Nazi invaders are being systematically emptied of all Jews except a few highly-skilled workers required for war industries. None of those taken away are ever heard of again. The able-bodied are slowly worked to death in labour camps. The infirm are left to die of exposure and starvation or are deliberately massacred in mass executions. The number of victims of these bloody cruelties is reckoned in many hundreds of thousands of entirely innocent men, women and children.

The above-mentioned Governments and the French National Committee condemn in the strongest possible terms this bestial policy of cold-blooded extermination. They declare that such events can only strengthen the resolve of all freedom-loving peoples to overthrow the barbarous Hitlerite tyranny. They reaffirm their solemn resolution to ensure that those responsible for these crimes shall not escape retribution, and to press on with the necessary practical measures to this end.<sup>10</sup>

#### THE UNITED KINGDOM DECLARATION, 30 AUGUST 1943

Although it was obvious that warnings of the retributive purpose of the Allied Powers had not the slightest effect on Germany's pursuit of its policies of mass murders in concentration camps, forced labour in factories and acts of cruelty in many forms, statements of the retributive aims of the Allied Powers continued to be made. On 30 August 1943, the British Government pronounced its resolve:

... to punish the instigators and actual perpetrators of the crimes ... so long as such atrocities continue to be committed by the representatives and in the name of Germany, they must be taken into account against the time of the final settlement of Germany.<sup>11</sup>

### THE MOSCOW DECLARATION, 30 OCTOBER 1943

It is generally accepted that the declaration made on 30 October 1943<sup>12</sup> at the meeting in Moscow of Prime Minister Churchill, President Roosevelt and Marshal Stalin created the mould for the development of the procedures which culminated in the establishment of the International Military Tribunal at Nuremberg. The declaration is reproduced in Appendix I to this Chapter and is discussed in the conclusion to the Chapter.

### STATEMENT BY THE AMERICAN PRESIDENT, 30 JULY 1943

Declarations by the Allied Powers of their intention to bring German war criminals to trial and punishment were made against a background of apprehension that some neutral countries might grant refuge to such criminals. These fears had prompted the American President to make the following public statement on 30 July 1943, shortly before the Moscow Declaration:<sup>12</sup>

On August 21, 1942 I issued a statement to the press in which, after referring to the crimes against innocent people committed by the Axis Powers, I stated:

The United Nations are going to win this war. When victory has been achieved, it is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to the barbaric crimes of the invaders, in Europe and in Asia. It seems only fair that they should have this warning that the time will come when they shall have to stand in courts of law in the very countries which they are now oppressing and answer for their acts.

On October 7, 1942 I stated that it was the intention of this Government that the successful close of the war shall include provision for the surrender to the United Nations of war criminals.

The wheels of justice have turned constantly since those statements were issued and are still turning. There are now rumors that Mussolini and members of his Fascist gang may attempt to take refuge in neutral territory. One day Hitler and his gang and Tojo and his gang will be trying to escape from their countries. I find it difficult to believe that any neutral country would give asylum to or extend protection to any of them. I can only say that the Government of the United States would regard the action by a neutral government in affording asylum to Axis leaders or their tools as inconsistent with the principles for which the United Nations are fighting and that the United States Government hopes that no neutral government will permit its territory to be used as a place of refuge or otherwise assist such persons in any effort to escape their just deserts.<sup>13</sup>

Contemporary opinion was not, however, unanimous that neutral countries would necessarily heed the American President's appeal. For example, Dr. Manfred Lachs said:<sup>14</sup>

The replies of the neutral Governments and Press were not very satisfactory. It was pointed out that war crimes are somehow of the nature of political offences, and that in some circumstances the offender should be granted the right of asylum.

The situation which has arisen after Moscow can be summarised as follows: The United Nations have again declared their determination to pursue all war criminals and to bring them to justice from

wherever they be found. The Neutrals are not yet convinced about their duty to refuse asylum to them. Should, therefore, a war criminal be found in one of the thirty two of the United Nations, he will not escape justice. But should he reach a neutral country, will then the right of asylum be granted to him? Will it mean justice?

The right of asylum has so far been the privilege of political offenders. Can it be applied to war criminals, or are war criminals political offenders? An analysis of the political offence as such and its comparison with war crime will give us the solution of the problem.

After analysing the principles which had been developed in civilised countries with respect to what conduct amounts to a political offence, so as to entitle the culprit to asylum and to resist extradition, Dr. Lachs concluded:

It seems to be clear in the light of the considerations above that war crimes are definitely 'at variance with accepted ideas concerning ... political offences', to use the phrase of the St. James's Palace Declaration of 13th January 1942.

All war crimes, whether committed by members of the armed forces or civilians, are completely deprived of those elements which entitle the political offender to claim the right of asylum.

They are common criminals and come under the general rules of extradition. Every State on whose territory a war criminal sought refuge is under the obligation to hand him over to the State who claims him. This concerns all States, belligerent and neutral alike.

There can therefore be no exception from the principle accepted in Moscow - that the three Allied Powers will pursue all war criminals to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

The claim to neutral State is legally justified. War criminals cannot be treated as political offenders. They will have to be handed over to the accusers.

The cited extract from Dr. Lachs' article has been included in the text of this Chapter only because of the statement of the American President on 30 July 1943. The political offences doctrine has an extensive scope, but as it is not relevant, at least directly, to the subject matter of this study it will not be pursued.

Finally, Allied statesmen announced at Yalta on 11 February 1944 their 'inflexible purpose to ... bring all war criminals to just and swift punishment'.<sup>15</sup>

## CONCLUSION

The chronological review in this chapter of the warnings to the Axis Powers reveals uncertainty with respect to the precise state of accepted international law in relation to 'war crimes', however they may be defined.

It is noteworthy, however, that all the warnings related to war crimes *stricto sensu*, with one exception. That was the last paragraph of the Moscow Declaration of 30 October 1943, in which it was stated:

The above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies.

Insofar as the warnings referred only to offences against the laws and customs of war, they were merely political in character and effect; they did not expressly add, or purport to add, any new dimension to established rules of international law. However, they impliedly foreshadowed, although in the writer's view not intentionally, the



abrogation of the act of State doctrine and of the defence of superior orders.

In respect of the exception in the Moscow Declaration, it foreshadowed, albeit in a vague and imprecise way, part of the Nuremberg Charter and the indictment. However, it reflected the lack of crystallisation of any definite policy for the proposed action against the major German war criminals. This is not surprising because of differing political attitudes of the Allied Powers, which were not reconciled until nearly two years later.

The exception does, however, reinforce the judgment of the Tribunal, in which it stated:<sup>16</sup>

Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.

## NOTES

1. History of U.N.W.C.C., pp. 102-103.
2. The Times, London, 12 November 1940 .
3. The Times, London, 20 December 1940 .
4. The Molotov Notes on German Atrocities. Notes sent by V.M. Molotov, People's Commissar for Foreign Affairs, to all Governments with which the USSR had diplomatic relations. Issued on behalf of the Embassy of the USSR in London, H.M. Stationery Office, 1942 .
5. Loc. cit.
6. History of U.N.W.C.C., pp. 90-91.
7. Parliamentary Debates, House of Lords, Vol. 124, No. 86, col. 563; History of U.N.W.C.C., p. 105.
8. Loc. cit., cols 557-87.
9. Punishment for War Crimes (2), published by H.M. Stationery Office, London, for the Inter-Allied Information Committee, pp. 9-10.
10. Parliamentary Debates, House of Commons, Vol. 385, No. 17, cols. 2082-2084 .
11. The Manchester Guardian, 30 August 1943.
12. The date ascribed to the Moscow Declaration varies--either 30 October 1943 or 1 November 1943. In this study the date adopted is 30 October 1943, except when the date is different in cited material.
13. Foreign Relations of the United States, Diplomatic Papers, 1943, Vol. 1, General, United States Government Printing Office, Washington.
14. Juridical Review, Vol. LVI, No. 1, April 1944, pp. 40-41.
15. For this extract, and generally in relation to this chapter, see Woetzel, pp. 3-5. A number of other official pronouncements on the treatment of war criminals are summarised in Appendix B to Professor Glueck's work The Nuremberg Trial and Aggressive War, Alfred A. Knopf, New York, 1946. Those pronouncements have not been included in the text of this chapter because they appear to lack the world-wide impact of those which have been cited.
16. I.M.T. Judgment, p. 39.

## APPENDIX I                      THE MOSCOW DECLARATION. 30 OCTOBER 1943

The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of the atrocities, massacres and cold-blooded mass executions which are being perpetrated by the Hitlerite forces in many of the countries they have overrun and from which they are now being steadily expelled.

The brutalities of Hitlerite domination are no new thing and all peoples or territories in their grip have suffered from the worst form of government by terror.

What is new is that many of these territories are now being redeemed by the advancing armies of the liberating powers and that, in their desperation, the recoiling Hitlerite Huns are redoubling their ruthless cruelties. This is now evidenced with particular clearness by the monstrous crimes of the Hitlerites on the territory of the Soviet Union which is being liberated from the Hitlerites and on French and Italian territory.

Accordingly, the aforesaid three Allied Powers, speaking in the interest of the 32 United Nations, hereby solemnly declare and give full warning of their declaration as follows:

At the time of the granting of any armistice to any Government which may be set up in Germany, those German officers and men and members of the Nazi Party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be erected therein. Lists will be compiled in all possible detail from all these countries, having regard especially to the invaded parts of the Soviet Union, to Poland and Czechoslovakia, to Yugoslavia and Greece, including Crete and other islands, to Norway, Denmark, the Netherlands, Belgium, Luxembourg, France and Italy.

Thus, the Germans who take part in wholesale shootings of Italian officers or in the execution of French, Dutch, Belgium or Norwegian hostages or of Cretan peasants, or who have shared in the slaughters inflicted on the people of Poland, or in the territories of the Soviet Union which are now being swept clear of the enemy, will know that they will be brought back to the scene of their crimes and judged on the spot by the peoples they have outraged.

Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three Allied Powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.

The above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical location and who will be punished by a joint decision of the Governments of the Allies.

## CHAPTER 5 THE SIGNIFICANCE OF THE UNITED NATIONS WAR CRIMES COMMISSION IN THE DEVELOPMENT OF 'NUREMBERG LAW'

### INTRODUCTION

On 20 October 1943—more than four years after World War II began and a year after Lord Simon had announced in the House of Lords the proposal to create a United Nations Commission for the Investigation of War Crimes—the United Nations War Crimes Commission was established at a meeting at the British Foreign Office, London, of representatives of Allied Nations. The establishment of the Commission was obviously intended to be seen as a practical supplement to the Moscow Declaration, which was almost contemporaneous. Its authority was expressed in the following limited terms:<sup>1</sup>

1. It should investigate and record the evidence of war crimes, identifying where possible the individuals responsible.
2. It should report to the Governments concerned cases in which it appeared that adequate evidence might be expected to be forthcoming.

The work of the Commission will be considered in this chapter primarily by reference to the minutes of its meetings. It is then proposed to evaluate its achievements in the context of their significance in the development of 'Nuremberg Law' and preparations for the trial of Nazi war criminals. Finally, there is a brief reference to Lord Wright's claim concerning the contribution by the Commission in this respect.

### Consideration of the early records of the Commission

A legal perception of the state of international law relevant to Nazi war crimes is reflected in the following statement made, according to the minutes, by Lord Atkin, then the representative of Australia, at the first unofficial preliminary meeting of the Commission in London 26 October 1943:

It was important to free oneself from legalistic notions, whereby crimes could only be punished if they fell within the definition of war crimes. That would defeat the whole object ... The reason for this departure was that the offenders had gone right outside the realm of law. The only way was to prepare a list of offences for which punishment should be awarded ... he proposed that the Commission should draft its own list.

Dr. Ecer, the representative of Czechoslovakia, 'said that his Government had prepared lists of all criminals, and had prepared laws to deal with them, adopting the principle "Loi exceptionelle sans appel."'

At the second unofficial meeting of the Commission on 2 December 1943, the first meeting at which Sir Cecil Hurst acted as chairman, and at which Mr. Herbert Pell sat for the first time as the official representative of the United States of America, the meeting adopted with two amendments a report of a sub-committee 'on the lines on which the Commission should approach its task'. The significant feature of this meeting was the decision of the Commission that the words 'and will at the same time avoid any semblance of ex post facto legislation' should be omitted from paragraph 8 of the report, which stated: '.....It will have the further advantage that it will enable particular acts to be added to the list of those to be treated as war crimes from time to time as circumstances may require.'

The minutes of the third unofficial meeting of the Commission on 4 January 1944 make it clear that members of the Commission were impatient to have it officially constituted. However, for a body with very few staff<sup>2</sup> the following minute appears naive, especially as the war had been in progress for more than four years and by then, as history has recorded, millions of 'war crimes' had already been committed:

It was agreed that the responsibility for placing names of war criminals on the Commission's list, i.e. on the list of persons whose surrender for trial the Commission recommended the United Nations to demand, lay entirely with the Commission. The possibility of delegating powers in this matter to sub-committees, if there was a great influx of cases, was mentioned.

The meeting on 18 January 1944 is noteworthy because for the first time it was mentioned that there was a degree of Ministerial involvement so far as the United Kingdom was concerned. That portion of the minutes read:

The Chairman reported that he had had an opportunity of showing to Mr. Eden, the Secretary of State for Foreign Affairs in the United Kingdom, the decisions reached at the meeting of the Commission on January 11 and that Mr. Eden was strongly in favour of the Commission getting to work forthwith as decided at that meeting.

There had been discussions at earlier meetings in respect of the appointment of a so-called Technical Committee of the Commission, but, at the meeting on 11 January 1944, its fate appeared extremely dubious. What is significant, in relation to the future achievements of the Commission, is that the then Chairman, Sir Cecil Hurst, said that if the Technical Committee was abandoned, the War Crimes Commission would be the sole body representing the United Nations which 'dealt with' war crimes. The minutes do not contain any explanation of what the words 'dealt with' were intended to convey.

At the meeting on 25 January 1944, the proposal for the appointment of a Technical Committee was formally abandoned. This meeting is important because of the contribution of Dr. Ecer (Czechoslovakia). On his motion, it was resolved that three sub-committees, subsequently referred to as Committees I, II and III respectively, should be appointed to consider (a) facts and evidence; (b) 'means and methods of enforcement' and (c) legal questions.

Three significant matters are recorded in the minutes of the meeting on 8 February 1944:

That Mr. Eden did not intend to convoke another meeting at the Foreign Office following the decision not to establish a Technical Committee, but that 'he thought it would be sufficient to send a Note to each of the Governments of the United Nations on the subject.'

The 'maximum financial liability to be incurred by the Commission down to 31st March 1944' was fixed at 1,100.00 pound sterling.

It was decided that 'the question of an International Court would not be considered for the time being.'

The most positive achievement at the meeting on 15 February 1944 was the receipt of a report that the Polish Government had agreed to pay a 'basic contribution' of \$400 to the expenses of the Commission, which still saw its role as the principal body among the Allied Powers in determining whether a prima facie case existed to justify the prosecution of any individual by some court or tribunal, wherever it might exist and however it might be constituted.

As the Allied forces continued to advance on all fronts and preparations for the Allied landings in Europe progressed rapidly, the malaise associated with the United Nations War Crimes Commission continued. At a meeting on 22 February 1944, Mr. Pell, chairman of the Enforcement Committee, stated that the Committee regarded the consideration of the organisation of an international court as a necessary preliminary to its work, and therefore proposed, with the Commission's permission, to begin discussions on the subject as soon as possible. The Chairman of the Commission said he had been unable to obtain the promise of the Attorney-General of the United Kingdom to attend a meeting of the Commission for the purpose of discussing the question and in these circumstances he could not ask Committee II to wait longer before taking it up.

There is significance in the minutes of the meeting of the Commission on 7 March 1944, at which Professor Glaser (Poland), chairman of Committee III (legal questions), said he 'regarded the question of the kind of national courts which should deal with war crimes as one for Committee II, and for the time being was leaving

alone the question of 'retroactivity of legislation'. The use of such language does not suggest any conviction in the existence of a body of relevant established principles of international law.

The signs of dissension and disillusionment appeared formally at the meeting on 21 March 1944, when the French representative, M. Burnay, who attended in place of M. Gros, read on the latter's behalf a highly critical declaration and asked that it be inserted in the minutes.<sup>3</sup>

At the same meeting, approval by Committee I of a proposal of Committee II 'to intern the whole Gestapo at the time of the armistice' was expressed by the Belgian representative. The minutes do not contain any reference to the estimated numbers of members of the Gestapo at that time. In fact, a realistic estimate is probably between 30,000 and 40,000.<sup>4</sup>

The first sign that the British Government was prepared to pay any serious consideration to the activities of the Commission appeared at the meeting on 2 May 1944, when Sir Donald Somervell, Attorney-General of the United Kingdom, and Sir William Malkin, legal adviser to the British Foreign Office, were present. The principal significance of this meeting was that the Commission considered a report by M. de Baer, the Belgian delegate, who was chairman of Committee I, which concluded with the following paragraph:

Political action. Caution should be used in dealing with criminals politically.<sup>5</sup> If it is contemplated to punish some enemy leaders by political rather than judicial action, the consequences of such action should be carefully measured: if such punishment is death and is inflicted soon after the Armistice(x) [see footnote below], there is less objection than if it were mere exile (cfr. Napoleon). But if the main criminals, who are responsible for the waging of war as well as for taking part in the most heinous crimes (annihilation of the Jewish race, deportations, policy of terrorism), are merely to be exiled, it will be morally impossible for any court to inflict a more severe punishment (death) upon persons accused of lesser atrocities or who have merely acted upon order of those major criminals. Many of us consider political action as undesirable altogether and would prefer judicial action but, if for reasons of political expediency it is impossible to do otherwise, political action should be exceptional, and restricted to cases such as Hitler, Hiro Hito, and others such as Mussolini, who are, in fact if not in name, Heads of State.

(x) In an unspectacular way, preferably by hanging: there is no reason to make the execution of these people other than ignominious. Moreover, it is more difficult to make a hero out of a man who was obscurely hanged than out of a man who was shot or may even have been allowed to give the theatrical order of "Fire" at his own execution.

The guarded response of the British Attorney-General to this conception of 'political action' is thus minuted:

Sir Donald Somervell gave the Commission to understand that the matter was still under consideration between the Governments and that the Commission, while it should not exclude cases implicating such persons, was not called upon to seek evidence against them.

Minutes of meetings of the Commission in May and June 1944 illustrate the perception of the Commission that its role should not merely be in relation to war crimes stricto sensu, but its approaches to the British Government on this question were not received with enthusiasm.

One significant matter considered at a meeting on 13 June 1944 was the appointment of a sub-committee to study 'the question whether preparation for and launching of a war of aggression and individual acts of preparation for such a war were crimes'. This appears to have been the first positive step of a jurisprudential nature taken by the Commission.

In view of the role played by Lord Wright in the later work of the Commission, it should be noted that, at the meeting on 25 July 1944, the Commission was informed that he had been appointed by the Australian Government to act as its representative on the Commission, in succession to Lord Atkin, who had recently died.

The meeting on 22 August 1944 was the first occasion on which Lord Wright was present. It appears from the minutes that a spirit of urgency was abroad, because they record:

... the war with Germany was plainly reaching a climax and, as the Commission must have a first definitive list of war criminals ready when the armistice was granted, the Chairman suggested a date to which it should work. Purely as a result of his personal appreciation of the situation, he suggested 10 November next. This was agreed to.

The general lack of co-ordination within the Commission is strikingly illustrated by the following extract from the minutes of the meeting on 29 August 1944:

It was agreed that under the supervision of Committee I evidence should be collected for the framing of well-considered statements of the charges which can be made against Hitler and other arch-criminals. These statements, after being submitted to the Commission, would be kept available for use at the proper moment.

There was apparently no reference to the manner in which a body, with only a few staff, could attempt to carry out such a task, or of the nature and extent of liaison with other authorities, including the armed forces and Allied Governments.

The meeting on 5 September 1944 is noteworthy because, for the first time, serious and detailed consideration appears to have been given to the questions of jurisdiction and procedure in relation to war crimes trials. The minutes contain a reference to a 'treaty court'.<sup>6</sup> Clearly there were many divergent views, despite the attempt of the chairman to gloss over the divergences. Lord Wright's views were thus minuted:

Lord Wright said that at this stage only military courts can do the job effectively and speedily. He could see no practical alternative at this stage. The Supreme Commander should investigate and try cases. The Government should press this upon the military authorities. The military commander had jurisdiction to punish any war criminals who were in his custody, quite apart from when and where their war crimes were committed. Therefore no treaty was needed. (emphasis added).

It is clear that Lord Wright had not at that stage perceived any scopes for a tribunal such as was established by the London Agreement and Charter of 8 August 1945.

As the ultimate victory of the Allied Powers became certain and closer in time, the minutes of the Commission in September 1944 showed weakness and lack of any real purpose. There was no apparent knowledge by the Commission of any plan among the major Allied Powers which was to lead to the London Agreement and Charter of 8 August 1945 and there was lack of unanimity on many matters of detail. Dr. Ecer, the representative of Czechoslovakia, tendered his resignation from two of the three Committees and, in a letter advising the Commission of this decision, said he was considering resigning from the Commission itself. He gave no reason, but obviously was dissatisfied with the attitude of the Commission to its functions and with its lack of achievement.

It is surprising that at the meeting on 26 September 1944--within about seven months of the final capitulation of Germany--there was a lengthy debate as to whether the, so-called 'arch-criminals', such as Hitler and many of his associates who were to be tried at Nuremberg, should be included in the Commission's lists of war criminals. It is also surprising that the Chairman, apparently without any actual knowledge of what the principal Allied Powers proposed, should have said, according to the minutes:

The Chairman said that the omission of the arch-criminals from the lists would not mean that they would go unpunished. The Moscow Declaration appeared to envisage their punishment by executive action rather than a judicial trial.

The Chairman did not elaborate on what he meant by 'executive action'; no doubt, he had in mind Churchill's view that the first 100 major war criminals arrested should, on proper identification, be summarily executed without trial.

The influence of Lord Wright became apparent at meetings of the Commission from 3 October 1944. On that date, obviously oblivious of, American bureaucratic and political thinking, the Commission approved a draft Convention for the establishment of a 'United Nations War Crimes; Court' with jurisdiction in respect of 'an offence against the laws and customs of war'. The proposed jurisdiction of such a court (adapted from Article 38 of the Statute of the International Court of Justice) and the attitude of the British Government to the views of the Commission are referred to in Chapter 2. All of the documents assumed there would be British dominance in the implementation of their provisions. In this respect they were inconsistent with the tenor of the talks in Moscow from 9 to 20 October 1944 between Churchill, Eden and Stalin.

The notable feature of the meeting on 10 October 1944 was that the Commission realistically reconsidered its previous views on whether or not the preparation for, and launching of, the then existing war constituted a war crime and should be treated by the Commission as such.

Dr. Ecer, who had submitted a minority report, in a statement amplifying his report, said, inter alia:

If we accept the fundamental point of view that the preparation and launching of the present total war are crimes because the whole policy which is the background of the present war is a criminal one, we will better understand such crimes as the extermination of foreign races, and we shall be able to put these crimes into the right light. That is, we shall be able to judge them according to their real substance, i.e. not as simple 'violations of laws and customs of war' but as instruments of a general criminal policy and as part of a criminal war.

The influence of Lord Wright was manifest at that meeting. The minutes of his remarks are reproduced in Appendix I to this Chapter because they illustrate the fundamental approach to the whole problem of 'Nuremberg Law' which he consistently adopted and which ultimately prevailed.

With Germany already in an incipient state of collapse, it is intriguing to study the minutes of the meeting on 17 October 1944, at which Lord Wright was not present, and to note the views expressed on the fundamental question discussed, but without finality, at the previous meeting. The general consensus of opinion was that the acts of preparing for, and the launching of, a war of aggression were crimes, but the Commission differed about the method of punishing the responsible leaders—for example, as the representative of China (Mr. Wunsz King) said, 'whether they should be punished on a judicial or political basis'.

In retrospect, it seems remarkable that the divergency of views was so marked that the Commission, after a lengthy debate, agreed without opposition to adjourn further consideration of this fundamental question for six weeks to enable representatives on the Commission to consult with their governments.

The increasing authority of Lord Wright was apparent in his appointment at the meeting on 31 October 1944 to the vacancy on Committee I, following Dr. Ecer's resignation. However, the following extract from the minutes reflects a puzzling conception by the Commission of its functions, even if it was the only practical course open to it:

M. de Baer (the Belgian representative, who was Chairman of Committee I) said that the Committee 'had continued to review the cases'—of which he gave the figures—and the work was now up to date (emphasis added).

Crimes of all descriptions were, as was notorious at the time, being committed in all theatres of war by Germans with unabated ferocity and cruelty, but it seems that at this stage at least the Commission was dependent, in the compilation of lists of war criminals, on reports from miscellaneous sources.<sup>7</sup>

The meeting on 7 November 1944 was notable because of the proposal of Lord Wright, the representative of



Australia, that the Commission establish a 'detective organisation'. The minutes of the debate on the proposal illustrate the extent of unpreparedness within the Commission to fulfil its task--a situation which was exacerbated by the apparent disinterest of the British and American Governments in its achievements. The proposal was simply referred to Committee II.

On 22 November 1944 there was a landmark meeting, because the Commission was in a position to adopt its first list of German war criminals. The minutes state:

As far as possible each name on the Commission's list would be accompanied by particulars of the rank or office held at the relevant date, the general nature of the offence charged and any available information likely to assist identification of the accused. Successive lists of war criminals, and in many cases particulars supplementing the information given regarding persons already listed, would be issued as the work proceeded.

The Commission resolved that the list as approved be transmitted to the Allied Governments for their information and for communication to the Supreme Commanders concerned, with the request that the Governments forward it to the European Advisory Committee of the Commission.

The catalyst for a degree of improvement in the performance of the Commission occurred on 20 December 1944. The Chairman of the Commission (Sir Cecil Hurst) was absent. It was said he 'was unwell'. He did not attend any other meeting of the Commission.

At that meeting, an Australian proposal (that is, of Lord Wright as its representative) for a modification of the system for the collection of evidence in respect of war crimes was adopted. The minutes record:

It is recommended that in view of the increase in the number of cases which may be expected, and of the further fact that in many instances the work of the national offices will be carried out from their own countries, and not from London, close contact between the Commission and the national offices should be maintained, where necessary, by the appointment: by the Government of officials for the purpose, or in some other appropriate way.

In view of the developments contemplated in the preceding paragraph, the Commission decides that a Central Investigation Officer be appointed at the headquarters of the Commission for the purpose of assisting the national officers at their request in the investigation of war crimes, of collecting evidence which is available to the Commission in order to transmit it to the national offices and of co-ordinating evidence. The Central Investigation Officer will be directly responsible to the Commission.

The most noticeable omission from the minutes of that meeting was any reference to the capacity of one 'Central Investigation Officer', directly responsible to the Commission, effectively to co-ordinate facts relating to German war crimes, which were at that stage being committed on an unprecedented scale.

### The Advent of Lord Wright as Chairman of the Commission

A significant development in the history of the Commission occurred at a meeting on 17 January 1945, when the resignation, on the grounds of ill-health, of Sir Cecil Hurst as representative of the United Kingdom was recorded. Lord Wright was asked to act as Chairman, pending the appointment of a successor to Sir Cecil Hurst. Lord Finlay was the new representative of the United Kingdom. Thereafter the Commission acquired a new and more vigorous momentum.

At the meeting on 31 January 1945 Lord Wright was elected Chairman. Coincidentally, it was reported that Mr. Pell, the representative of the United States of America, had ceased to be a member of the Commission. The significance of Mr. Pell's resignation is obvious. His continued membership of a body concerned with policies relating to future war crimes trials which were basically British in conception, ; was incompatible with contemporary American political and bureaucratic planning.

At the same meeting, there was marked lack of unanimity as to whether or not the Commission should respond to media criticism of its alleged lack of activity.<sup>9</sup>

Throughout February 1945, the minutes record very little progress. It appears that the Commission was obsessed by what it perceived was its inadequate public image.<sup>10</sup> The United States of America made it clear that it would dictate the essential basis of war crimes trials.<sup>11</sup>

## THE PERIOD FOLLOWING THE COLLAPSE OF THE THIRD REICH

Minutes of subsequent meetings of the Commission until the signature of the unconditional surrender of Germany on 8 May 1945 reveal desultory debate on disconnected issues and a general lack of perception by the Commission of its purpose and functions. Continuing lack of interest in the work of the Commission by British political leaders and government officers is apparent.

It is important to record that by the end of the war in Europe, the Commission's practical contribution to the forthcoming war crimes trials at Nuremberg and elsewhere was recorded in the minutes of the meeting on 3 May 1945 as the 'closing' of its eighth list of war criminals and the preparation of it 'for issue'.

In retrospect, there is considerable significance in a document adopted by the Commission on 3 May 1945, which set forth the following summary of an earlier discussion of the question whether the preparation for, or the launching of, an aggressive war was in itself a war crime, as so often asserted by Lord Wright and others:

On 18th September, 1944, it [Committee III]<sup>12</sup> reached the conclusion and recommended to the Commission that, while acts committed by individuals for the purpose of preparing for and launching aggressive war, were, lege lata, not war crimes, it was desirable that for the future penal sanctions should be provided for such outrages (emphasis added).

Dr. Ecer, representative of Czechoslovakia, disagreed with the Committee's conclusion, viz. that acts committed by individuals for the purpose of preparing for and launching aggressive war were not war crimes, and filed a separate report with the Commission. However, except as this view rendered it unnecessary to consider whether future penal sanctions should be provided, it was not urged that it was undesirable to expressly provide such sanctions.

After discussion in the Commission, consideration of the principal question was referred to the Governments with the request that the Governments make known to the Commission their views thereon.

One of the principles proclaimed by Chapter II of the Dumbarton Oaks Proposals is as follows: 'All members of the Organization [the United Nations Organization] shall refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the Organization'. Thus, not only war, but 'any use of force' or 'threat of force' are prohibited by the proposals.

Observance of this rule is to be enforced by the Organization not only in respect of member States but also in respect of States which are not members of the Organization. An effective means to ensure such compliance is the establishment of individual responsibility for persons who, acting for States, violate the rule. Therefore, it would seem that the Charter of the United Nations is an appropriate place to set forth the principle of individual responsibility for the threat or use of force, and thus provide future penal sanctions for acts committed for the purpose of preparing and launching aggressive war (emphasis added).

Against this background, the Commission recommended that the Charter of the United Nations 'establish in substance the following rule':

Any person in the service of any State who has violated any rule of international law forbidding the threat or use of force, or any rule concerning warfare, especially the obligation to respect the generally recognised principles of humanity, shall be held individually responsible for these acts, and may be brought to trial before the civil or military tribunals of any State which may secure custody of his person and punished by death or any lesser punishment.

There was a further recommendation that:

The obligation be imposed in the Charter upon the member States to incorporate the above provision in the criminal statutes of their country, provide a penalty and confer upon the Courts the necessary jurisdiction to try and punish the offenders.<sup>13</sup>

The expression of the considered view of the majority of the members of Committee III, the reference to the Allied Governments and the terms of the recommendations of the Commission on 3 May 1945 combine to demonstrate the fundamental lack of agreement on an issue which would become a basic element of 'Nuremberg Law'.

Minutes of meetings of the Commission on 15 May and 23 May 1945 show that it could not have been privy at that stage to the preparations by the principal Allied Powers for the Nuremberg trials. However, the relationship between the Commission and the British Government was finally clarified openly by the following letter, dated 1 June 1945, from the United Kingdom Foreign Office to Lord Finlay, the representative of the British Government on the Commission (formal parts omitted):

1 am directed by Mr. Secretary Eden to inform Your Lordship that the Prime Minister has appointed Sir David Maxwell-Fyfe, K.C., Attorney-General, as the representative of the United Kingdom to join with Justice Robert Jackson, of the United States of America, and with the Soviet and French representatives when they are appointed, in preparing and prosecuting charges of atrocities and war crimes against such leaders of the European Axis powers and other principal agents and accessories as the Government of the United Kingdom may agree with any of the United Nations to bring to trial before an Inter-Allied Tribunal.

2. I am to request Your Lordship to be so good as to bring this appointment to the notice of the President and members of the United Nations War Crimes Commission.

At the meeting of the Commission on 27 June 1945, Dr. Ecer, the representative of Czechoslovakia, submitted a report, following a visit to Germany where he had spent a month interrogating prisoners of war and witnesses, as a member of the United Nations War Crimes Commission and head of the Czech liaison team attached to the 12th Army Group. (Emphasis added). The report contained the following:

The German people were apathetic and indifferent to their guilt, and, in his opinion, they needed a hard hand and compulsion to obey orders. Not until the war crimes trials began, would the full importance of their complicity in the war crimes committed by their leaders be realised.

It appears that the Commission meeting on 11 July 1945 was the first at which there was reference to contact with representatives of the major Allied Powers. It was in the form of two letters, dated 5 and 6 July 1945, from Mr. Justice Jackson, United States Chief of Counsel for the Prosecution of Axis Criminality, to the Chairman of the Commission, in response to Lord Wright's request to Mr. Justice Jackson for a statement ... with regard to what exactly was required in the way of assistance from members [of the Commission]'. The basis of the response was confirmation of the plan set out in Mr. Justice Jackson's report to President Truman, of 7 June 1945,<sup>14</sup> which Lord Wright described as 'masterly'.

On 18 July 1945, three weeks before the signing of the London Agreement and Charter, Mr. Justice Jackson and advisers, including Colonel Bernays and Sir David Maxwell-Fyfe, conferred in London with the Commission. The minutes of the conference reveal little other than repetitive platitudes. Only two indications were given of the aims of the prosecutors of the four Allied Powers--first, in the words of Mr. Justice Jackson, 'he and his

collaborators were principally concerned in finding the designers of ... atrocities and the men who by their organisation and conduct of the German State made "those things" happen'; second, Colonel Bernays foreshadowed that part of the Nuremberg indictment whereby declarations of criminality against seven groups or organisations would be sought, by saying: 'The primary duty of the four prosecutors lay with major war criminals. His Government hoped that in the trials before the international tribunal there would be findings of criminality against certain of the notorious organisations which had been major instrumentalities in the carrying out of the design; it was common knowledge that most of the concentration camp officials had been members of the Gestapo or SS. If the prosecution followed the line which was hoped for, the result of a conviction in a trial before the international tribunal would be a *prima facie* showing of guilt by reason of membership in those organisations.'

## THE WORK OF THE COMMISSION AFTER THE SIGNING OF THE LONDON AGREEMENT AND CHARTER

On 8 August 1945, the day on which the London Agreement and Charter were signed, the Commission approved a further list (the 12th) of 1,000 names. It may be merely coincidental, but the minutes of that meeting contain the following enigmatic entry:

It was agreed that the names of the Commandant of Belsen Concentration Camp (Josef Kramer) and staff of 44 men and women be included in the list as Commission charges (emphasis added).

The fact is that the Belsen trial took place before a British Military Court at Luneberg, Germany, between 17 September and 17 November 1945.

The Commission at a meeting on 29 August 1945, endorsed the London agreement and Charter, but not unanimously.<sup>15</sup>

The establishment of the International Military Tribunal naturally resulted in a decline in the activities of the Commission, and meetings from the latter part of 1945 until the final meeting on 31 March 1948 were concerned principally with the approval of lists of war criminals. However, questions concerning the legal validity of the jurisdiction of the Tribunal arose from time to time.

The first serious signs of doubts concerning the validity of Article 6 of the Charter appeared at a meeting of the Commission on 14 November 1945, following remarks made by Colonel H.A. Smith, then Professor of International Law at London University, at the Belsen trial at which he appeared as counsel and made a closing address on behalf of all the accused. Part of the relevant minutes was:

At the request of the Chairman, Professor Gros, representative of the provisional Government of France, recalled the proposal he had made at the last meeting that the Commission should obtain a copy of Professor Smith's exact statement to the court regarding the guilt of the accused at the Belsen trial. He felt that, after the legal officers had examined the statement, the Commission might wish to take some action. He thought that if those views were known in some of the exoccupied countries, they would provoke serious apprehension, and that the Commission should be ready to state that they were only the views of one man, and did not necessarily represent the views held by British lawyers. He suggested that a statement be prepared for use if the need should arise.<sup>16</sup>

However, at the meeting on 5 December 1945, on the initiative of Dr. Liang (China), any question of public criticism of Professor Smith by the Commission was abandoned, a course in which Lord Wright concurred.<sup>17</sup>

It is curious that a Commission, many of the members of which were internationally renowned jurists, should have contemplated becoming involved in a public controversy concerning the basis of the Tribunal's jurisdiction while the Nuremberg trials were in progress, especially when they must have anticipated that the question of jurisdiction would involve major issues for argument before, and determination by, the Tribunal.

As it continued to prepare lists of war criminals, the Commission from time to time was faced with fundamental questions in respect of its authority to take into consideration crimes against peace and crimes against humanity, as distinct from crimes against the laws and customs of war. At a meeting on 9 January 1946 the question was discussed, but inconclusively and with the expression of conflicting views. It seems strange that eight months after the capitulation of Germany, the Commission had not obtained clarification of the extent of its authority on such a basic matter.

The debate, and the expression of different opinions by members of the Commission, continued at the meeting on 23 January 1946. Again, Lord Wright expressed his views with vigour, as the minutes record:

The Chairman felt strongly that the authority of the Commission extended to all war crimes in the widest sense, and therefore to all the categories mentioned in the four-Power agreement [the London Agreement], and that if that were agreed it was not necessary to refer the question to member Governments, as it was merely a question of construction.

However, other views prevailed and the discussion was adjourned.

At the next meeting on 30 January 1946, the impasse was finally resolved. After the further expression of divergent or qualified views, the Chairman moved a motion to the effect that crimes against peace and against humanity, as referred to in 'the four-Power agreement of 8 August 1945', are war crimes within the jurisdiction of the Commission. The motion was approved by nine votes, with six absentions.

The extraordinary way in which the conflict of opinion was resolved is heightened by the fact that more than two years had elapsed since the establishment of the Commission and nearly six months had passed since the signing of the London Agreement. There is no record in the minutes of meetings of the Commission that at any time it sought clarification of its position from the British Government on an issue which created marked discord within the Commission.

The Commission continued to collect, principally through offices of the nations represented on the Commission, lists of war criminals, but obviously it was becoming obsolescent, as many different types of courts in various European countries and zones of military occupation were conducting trials of persons alleged to have committed war crimes.

At a meeting on 29 October 1947 it was decided, with the concurrence of the British, United States and Australian Governments, 'that the life of the Commission be terminated not later than 31st March 1948'. On that date the final (135th) meeting of the Commission was held. One of its last acts was the approval of the 68th list of war criminals. This finalised the collection of nearly 40,000 names in four and a half years.<sup>18</sup>

## COMMENTARY ON THE COMMISSION'S WORK

The History of the United Nations War Crimes Commission and the Development of the Laws of War is a monumental work, of extreme value in a historical sense and for the purpose of analysing chronologically events and facts which traversed the period from the commencement of World War II until after the conclusion of the Nuremberg trials.

It is not easy to conclude with any confidence how effective the Commission was in practice<sup>19</sup>, or to make a judgment on whether, if it had not existed, the course, of the prosecution of war criminals would have been significantly different.

Nevertheless, the minutes of the meetings of the Commission reveal many deficiencies in its original structure and the methods it adopted to carry out its functions:

Its authority was originally expressed in vague and inadequate terms.

- . It lacked the resources to accomplish anything other than a token attempt to investigate and record evidence of war crimes.
- . There is no evidence in the minutes that at any stage it established appropriate liaison with the armed services of the Allied and Associated Powers.
- . Through no apparent fault of its own, it was largely ignored by the British Government, which had been responsible for its establishment.
- . It was not made privy to the negotiations between representatives of the Allied Powers prior to the execution of the London Agreement and Charter.
- . Its deliberations were frequently marked by discord and acrimony, and it was often difficult for the Commission to reach agreement on fundamental matters.
- . The Soviet Union was never represented on the Commission, although many of the most atrocious war crimes were committed on Russian soil against Russian soldiers and civilians.<sup>20</sup>
- . For more than the first year of its formal existence it lacked strong administrative leadership, and it was not until Lord Wright became the Chairman that, on the basis of the minutes, it manifested a sense of urgency in relation to its task.
- . It underestimated the political strength of the United States of America in the negotiations for the establishment of the Nuremberg Tribunal, and, at least until the London Agreement was almost in final form, it erroneously assumed that Great Britain would play a much more prominent role in those negotiations than in fact it did.

Criticism of the Commission should not be interpreted as directed only against some of its members. Many of the problems were inherent and the consequence of circumstances beyond the control of the Commission. In particular, the British Government did not, according to the minutes, show any enthusiasm for the task it had entrusted to the Commission.

The claim by Lord Wright that 'through the work of the Commission and other agencies, the United Nations had ready to their hands when the time came, a more or less practical scheme for the prosecution and punishment of war criminals, which was capable of being completed and put into effect when the Nazi resistance collapsed' is not tenable. (Emphasis added).

In relation to the concept of 'crimes against peace', it is true that from the beginning of his membership of the Commission Lord Wright was a strong advocate of its validity as expressive of established international law. However, the Commission as a body was unable to reach any clear agreement concerning the concept, and, in this respect, it is submitted that it is a fair conclusion that the Commission failed in one of the fundamental aspects of its responsibility.

In the opinion of the writer, an overall assessment of the significance of the Commission in the development of 'Nuremberg Law', made on a consideration of the minutes of all its meetings and associated documents, is that its practical influence was, at most, marginal. The Nuremberg principal trial would have proceeded under the London Agreement and Charter even if the Commission had not existed. Nevertheless, it fulfilled a desirable political purpose, especially from the viewpoint of the representatives of European Governments in exile in London. In that respect the Commission was a cohesive force, even though agreement on fundamental issues was often not forthcoming.

## NOTES

1. See History of the United Nations War Crimes Commission and the Development of the Laws of War, His Majesty's Stationery Office, London, 1948, Chapter 1, p. 3. (This work is referred to in the text and notes to this chapter as History of U.N.W.C.C. It was reviewed in eulogistic terms by Professor Hanbury in (1950) 66 L.Q.R., pp. 258-262). In the notes to this chapter, the minutes of the meetings of the Commission, from the unofficial preliminary meeting in London on 26 October 1943 until the final (135th) meeting on 31 March 1948, are designated 'U.N.W.C.C. Minutes', followed, where necessary, by the date of the meeting. Documents which form part of the minutes are separately described. The copies of the minutes perused by the writer were located within the Archives Section of the United Nations Organisation, New York. They are original copies of the minutes, signed by the Chairman of the Commission. A valuable 14-page document in the Archives Section, which the writer has considered, is designated 'Record Group 30: Records of the United Nations War Crimes Commission, London, 1943-49'. It comprises two sections thus described: '(a) History and organisation; (b) Records'.

2. It appears that the staff then existing or approved totalled three --an officer described as the Secretary-General, a chief clerk and a shorthand typist. See U.N.W.C.C. Minutes, 4 January 1944.

3. The declaration was as follows:

I made emphatic reservations regarding the document: concerning the preparation and transmission of cases which Committee I presented to the Commission on March 7th. Since then, at a meeting of the Committee on March 15th, I have repeated my observations, some of which were noted by the Chairman of Committee I.

I wish to summarise the position which I take in regard to Committee I's first report.

1. After 5 months of existence, barely 60 cases have been transmitted, most of which were incomplete and were placed in Class C. This number is horribly out of proportion with the real facts of German atrocities in Europe.

For the reasons stated below, there is absolutely no ground for supposing that the Governments will ever be able to increase the number of cases which comply with Committee I's requirements. When at the time of the armistice the Governments call for our list, our failure will be manifest.

2. Committee I cross-examines the Governments like a 'juge d'instruction'. In doing so it converts itself into a supranational judge, an attitude which no provision authorises it to adopt. For example, the Committee insists on having witnesses to prove acts attributed to a Gestapo chief although under some legal systems the real crime consists in the mere fact of being a Gestapo member operating in an oppressed territory. The Committee thereby refuses to put on its list a man who for the national judge is already by operation of the law an accused person.

Moreover, by assuming the position of a judge, Committee I prevents any case affecting the persons who bear the gravest responsibility from being dealt with, for there are no witnesses to the crimes which the ring-leaders have committed in the form of general orders or decrees.

3. In the case of crimes against prisoners of war, the Committee has found that the culprits are always unknown and cannot be identified unless the German General Staff should hand over its operation orders. Here also the list is empty.
4. The conclusion to be drawn from these observations is that the compilation of a list is not what the realities of the situation require. To draw up a list of war criminals might be a good idea in 1918, since crime had not passed the limits within which individuals can be held responsible. In 1944, when hundreds of thousands of persons have been put to death or terrorised millions of other persons, [sic.] crime has assumed a collective character to which no list of individual criminals can do justice.

Even if the Governments had proof of all the individual crimes, the atrocity of which Germany is guilty is not measured by the sum total of such crimes; it consists in her systematic organisation of crime.

I ask the Commission to examine carefully the path opened by Committee I's first report in order to make sure whether it leads to a solution of the problem of suppressing crime.

I venture to recall that the Commission has before it a draft of articles for insertion in the armistice which provides for the compulsory internment of all Gestapo and SS members. Committee II has clearly perceived that individual crime cannot be suppressed except within a framework of assured general security against the organisation of crime.

I ask the Committee to make a provisional report to the Governments on this question as soon as possible.

The public believes that lists are being drawn up now; perhaps the Governments have the same belief. It would be too serious a disappointment for the oppressed peoples to discover, at the moment of Europe's liberation, that the Commission has not fulfilled their hopes. There is still time to say that the method suggested by the Governments is not satisfactory, that a list cannot at present be drawn up.

Finally, it is open to doubt whether a list such as Committee I desires could ever be drawn up. The Germans have exterminated too many witnesses, destroyed too much evidence. But without prejudicing the future, the Commission can seek to discharge its duties by other means. I feel the time has come both to say this to the United Nations Governments and to do it.

4. In his closing address to the Nuremberg Tribunal on behalf of the United States of America, Mr. Thomas J. Dodd, executive trial counsel, said: (p. 65 of the official record, His Majesty's Stationery Office, London, 1946): 'When the RSHA, the Reich Main Security Office, was created in 1939, the Gestapo was not dispersed, but became a distinct department of that central office, as shown by the Chart of RSHA introduced in evidence, and by the testimony of the witnesses Ohlendorf and Schollenberg. They easily estimated the number of persons in the Gestapo at from 30,000 to 40,000'.
5. Emphasis added by the writer.
6. This is explained by Lord Wright in his introductory chapter to History of U.N.W.C.C., p. 7.
7. See History of U.N.W.C.C., Lord Wright's introductory chapter pp.3-4.
8. In the minutes, Lord Wright is recorded as having said that he desired to make clear that the Commission was an independent international body and was the chosen instrument of the various governments represented on it for the investigation of war crimes. It was not a prosecuting body, but it was the organisation which took the first steps in seeing that war crimes did not go unrequited. The Commission's primary task was to gather together the evidence upon which the military authorities would act in apprehending offenders. Effective liaison must be maintained with the national offices of the various governments (which prepared the cases sent to the Commission for placing on the lists of war criminals), and with the military authorities on the various world fronts (who would arrest the war criminals). In his view close co-operation with the Russian Extraordinary State Commission was eminently desirable. Both Commissions were working with the same end in view, and in his opinion their approaches to the common problem were not radically different.
9. The minutes record that the following statement was approved: 'At its meeting ... this afternoon the United Nations War Crimes Commission adopted the following resolution:

Reports have appeared in the Press suggesting that the success and even the continuation of the work of the United Nations War Crimes Commission are in danger. There is no question of the Commission ceasing to discharge the task placed on it by the Governments of the United Nations. On the contrary, its operations have been placed on a firmer basis by the liberation of Axis-occupied territory and the greatly increased opportunity of obtaining evidence.



10. It is remarkable that, at a meeting on 7 February 1945, three months before the surrender of the German armed forces, two members of the Commission stated that 'the mystery surrounding the Commission should be dissipated'.
11. On 1 February 1945, the Acting Secretary of State of the United States of America preserved the premier status of America in determining the course of war crimes trials (source: Radio Bulletin 28, Washington, DC) when he recapitulated public pronouncements by the President of the United States commencing in 1942 and added:

It is therefore fitting that we should again proclaim our determination that none who participate in these acts of savagery shall go unpunished. The United Nations have made it clear that they will pursue the guilty and deliver them up in order that justice shall be done. That warning applies not only to the leaders but also to their functionaries and subordinates in Germany and in the satellite countries. All who knowingly take part in the deportation of Jews to their death in Poland or Norwegians and French to their death in Germany are equally guilty with the executioner. All who share the guilt shall share the punishment.

Over the past months, officers of the Department of State, in consultation with other departments, have worked out proposals for the realization of the objectives stated by the President. Pending the outcome of current discussions with our allies on this subject, these proposals cannot be published. I wish, however, to state categorically that these proposals are as forthright and far reaching as the objectives announced by the President, which they are intended to implement. They provide for the punishment of German leaders and their associates for their responsibility for the whole broad criminal enterprise devised and executed with ruthless disregard of the very foundation of law and morality, including offences, wherever committed, against the rules of war and against minority elements, Jewish and other groups, and individuals.

12. Committee III was composed of representatives of Belgium, China, Czechoslovakia, Greece, the Netherlands, Norway, Poland, the United Kingdom and the United States.
13. The Commission's recommendations at its meeting on 3 May 1945 do not appear to be within the authority given to the Commission when it was established on 20 October 1943.
14. Jackson, Report to the President of the United States, released by the White House on 7 June 1945.
15. The minutes record:

Referring to Article 6 of the Charter the Chairman, Lord Wright, said that the Commission might feel itself impelled to agree as a corporate body, upon a declaration 'affirming the principles embodied in that Article. Such a declaration would be a record for the future of a consensus of opinion on vital questions of international law by expert lawyers from practically the whole civilised world.

There is no record in the minutes of the Commission's meetings that any such declaration was ever made.

16. The minutes reveal an acrimonious discussion, with very strong criticism by Lord Wright of the reported expression of Professor Smith's views.
17. The Belsen trial involved forty five accused. For completeness, and in order to explain the concern of members of the Commission at the reported remarks of Professor Smith, the following extract from Lord Wright's foreword to the report of the Belsen trial in Law Reports of Trials of War Criminals, selected and prepared by the U.N.W.C.C., Vol. 1, p. xi, dated October 1947, is reproduced:

A distinguished Professor of International Law, Colonel Smith was permitted by leave of the Court [a British Military Court sitting at Luneberg] to appear as an additional Defending Officer, the sanction of the Convening Officer having been first obtained. The effect of his address is given in the Report as are

also the reply of the Prosecuting Counsel and the comments upon it by the Judge Advocate in his summing up; I do not think it necessary to refer further to the matter here, except to observe that all the material objections have now been dealt with in the judgment of the Nuremberg Tribunal in the sense opposite to Professor Smith's arguments: indeed, if his arguments were in substance good, the validity of all the judgments delivered in the numerous war crimes cases which have been decided in Allied international, military and national Courts could not stand. The Military Court in this case obviously rejected these contentions. Though the doctrine of stare decisis does not apply in this region of war crimes decisions, such decisions are persuasive though not coercive, and the overwhelming mass of authority has now established a jurisprudence.

18. This estimate was given by the British representative, Sir Robert Craigie, chairman of Committee I, at the final meeting. See also History of U.N.W.C.C., Statistical Report of Cases Listed by Committee I, Appendix III, pp. 508-514. On p. 514 it is stated that the Commission issued 80 lists of war criminals, including 26 lists of Japanese war criminals prepared by the Nanking (Chungking) Sub-Commission.
19. There is an interesting note in the minutes of the meeting on 29 August 1945, three weeks after the signing of the London Agreement and Charter. Colonel Hodgson, the representative of the United States of America, said he had been informed and authorised to advise the Commission 'that it is the view of the State and War Departments of the United States, that great weight should be given to a determination of the War Crimes Commission placing a name upon the War Crimes List, and that, in the absence of extraordinary circumstances, this determination should be accepted'. It is, of course, a matter of speculation whether this tribute was, in the circumstances, sincere.
20. History of U.N.W.C.C., pp. 22, 111-113 and 158-159.

# APPENDIX I MINUTE OF OBSERVATIONS OF LORD WRIGHT AT THE MEETING OF U.N.W.C.C. ON 10 OCTOBER 1944

Lord Wright said that he supported in principle Dr. Ecer's minority report. He thought that the preparation for and launching of the present totalitarian war constituted a war crime and should be treated by the Commission as such.

The majority report correctly described it as a grave outrage against the elementary principles of international law. That is an apt description of a crime. It is indeed the most serious of war crimes. Unless international law fastens criminal responsibility on individuals for war crimes, it is not possible to postulate guilt under international law (which is what both military courts and the proposed Interallied Court would enforce) on the part of the actual perpetrators of the atrocities, who have executed the cruelties, the mass murders, the terrorism, the mass deportations, the acts of wanton and revengeful destruction and devastation which were all carried out in pursuance of the settled and declared policy of Hitler and his associates, the authors and originators of the whole nefarious scheme.

Lord Wright did not think it necessary to repeat the weighty pronouncements quoted by Dr. Ecer on international law, all agreeing that the launching of such a war was a crime under international law.

The contrary view is that there can be no crime under international law unless it is possible to cite a lex lata, that is unless you can refer to a specific section of a valid and binding code, constituting the crime and accompanied by the express sanction of a defined punishment.

Lord Wright cannot accept this narrow meaning of the nature of law. He is accustomed to finding law in the developing principles of the common law. For instance, in English law there is no specific statutory provision making murder a crime. The same is true of piracy jure gentium. In international law there is no specific code, indeed there has never been any competent legislature. The ius gentium is to be extracted from a number of sources, which has [sic] been described by this Commission or its Committees.

The mass of expert opinion of instructed writers on international law which Dr. Ecer has quoted, constitutes satisfactory evidence of a general consensus of authoritative opinion as to the principle that launching a war like the present is a crime; this corresponds to what the moral sense of humanity demands. Thus the most essential source of international law is established.

So is another source, to be discovered in solemn international treaties, conventions and the like: in particular, besides the Convention of the League of Nations and the Geneva Protocol, there is the Pact of Paris, or the Briand-Kellogg Pact, which is categorical on this point, as Dr. Ecer has shown. What dissentient voices there are, do not outweigh the general consensus of the civilized world.

The absence of lex lata would no doubt prevent a man being convicted and punished for something the culpability of which might fairly be regarded as doubtful; the criminality of Hitler and his associates in launching the present total war, for which he has been preparing for years, the aggressive purpose and character of which he had proclaimed, cannot be contested. There was no need of an express code nor was there need of an express sanction, unless international law has no teeth. All that was needed was an appropriate tribunal, capable of doing justice when the facts were proved before it. Any other conclusion would shock the moral sense of mankind. It cannot be said that international law in this context only concerned itself with matters between sovereign States.

## CHAPTER 6 THE BIRTH OF 'NUREMBERG LAW'

### INTRODUCTION

The decisions to establish the Nuremberg Tribunal and to frame the charges against the accused were made against a background of political disputation among the Allied Powers. The disputation is apparent from contemporary records, some of which have only become available by the comparatively recent declassification of State documents in the United States of America and Britain.

It is the purpose of this chapter to examine the documentary record chronologically over a period of about one year before the London Agreement and Charter of 8 August 1945. This will enable a judgment ultimately to be made on the legal strength of the Agreement and Charter in the light of the documentary record, and of the claims made by the leaders of the Allied Powers that settled principles of international law were applied in their formulation.

The survey in the chapter is essentially confined to an historical account of the divisions and diversions among the Allied Powers, primarily Great Britain and the United States. In particular, it is designed to illustrate the absence of any conceptualisation of the nature and scope of the Nuremberg trials and of any precise analysis of their legal justification until the war was virtually at an end.

#### The period from 21 August 1944 to 11 November 1944

Although, as discussed in Chapter 4, stern warnings had been given to the Axis Powers concerning the fate of Nazi 'war criminals' for more than two years, it is apparent from the combined Allied Government records that no coherent plan had been devised, let alone agreed upon, as to how retribution would be effected pursuant to such warnings. Indeed, this remained the case until nearly a year after the successful Anglo-American landing at Normandy on 6 June 1944.

By August 1944, the success of the Allied counter-attack, combined with the defeat of the German forces in North Africa and the Allied advances on Italian territory, had converted justified optimism in an Allied victory into a certainty. The understandable concentration of the Allies on achieving military victory until then could now no longer be their exclusive object. Two results of the prospective Allied victory were the need to make speedy decisions concerning the form of the future government of Germany and to formulate principles concerning the nature and scope of the threatened retributive action against the leaders of the Nazi Government and its armed forces.

The first document which casts light on the broad policy in relation to war crimes of any of the Allied Powers was an 'interim directive' for the military government of Germany issued by the American War Department on 21 August 1944.<sup>1</sup> It contained directions for the apprehension and detention of specified classes of Nazi officials and war criminals.

About the same time, the American War Department issued a Handbook of Military Government for Germany, which set out the groups of 'Nazi police, Party, para-military and government officers who were to be interned.'<sup>2</sup> It was stated in the Handbook that Nazi officers in the listed categories 'will be arrested and detained upon the entry into Germany of the Allied Occupational Forces'. The official estimate of the total number of individuals in all categories was about 220,000, of whom it was estimated approximately one half would be in the western zone.

In order to illustrate the attitude of the British Government in late 1944 to the scope of its intended retribution, it is necessary to refer in the context of this chapter to a British aide-memoire, dated 19 August 1944, from the British Ambassador to the United States, Lord Halifax, to the United States Secretary of State, Mr. Hull.<sup>3</sup> Essentially, that document stated:

... His Majesty's Government ... propose that their attitude ... should be as follows:

- (A) Sir Cecil Hurst [Chairman of the United Nations War Crimes Commission] should be informed that His Majesty's, Government cannot agree to any extension of the terms of reference of the United Nations War Crimes Commission to enable it to deal with atrocities committed on racial, political or religious grounds in enemy territory.
- (B) The United Nations should not assume any formal commitment to ensure the trial of those responsible for such atrocities; nor should they impose upon the enemy any formal obligation to try them or surrender them for trial. The United Nations should, however, be prepared to bring pressure to bear, upon successor Governments in enemy countries to ensure that criminals are brought to justice. The War Crimes Commission should be informed of the general intentions of the United Nations in this respect.

On 25 August 1944, a strongly worded statement on war criminals was submitted by the American Jewish Conference to the United States Secretary of State. The statement invited attention to the principal declarations of the heads of the Allied Powers, as set out in Chapter 4. It rightly claimed that 'the United Nations, being aware of the manifold crimes committed by the Axis Powers against the Jewish people, have solemnly and officially affirmed as their policy toward all those guilty of these crimes the exaction of full and just retribution'.<sup>4</sup>

Near the end of August 1944 differences of opinion became manifest between political leaders in the United States. The Secretary of the Treasury, Mr. Henry Morgenthau Jr., was a strong advocate of ruthless and condign punishment of the Nazi leaders, but not by any judicial process. He urged their summary execution by the advancing Army units in Europe. His proposals posed a major problem for the Secretary of War, Mr. Henry Stimson, who, on 25 August 1944, made the following notes for a conference with the President.<sup>5</sup>

Policy vs. liquidation of Hitler and his gang. Present instructions seem inadequate beyond imprisonment. Our officers must have the protection of definite instructions if shooting is required. If shooting is required it must be immediate; not postwar.

Two significant matters are apparent from other documents.<sup>6</sup> First, even in the midst of dissension in the American Cabinet in the last week of August 1944 none of the leaders appears at that time to have given any consideration to the legal basis of the proposed action by the Allied Powers, whether it was the hard-line approach of Morgenthau or the more cautious, and obviously politically motivated, attitude of Stimson. Second, no cohesion appears to have existed at that stage between the Allied Powers in respect of the formulation of an overall strategy for dealing with the issue of war crimes. It is surprising that a concerted effort was not made by the end of August 1944 to bring together the Governments of the Allied Powers and representatives of the Armed Forces so that, with the best legal advice available, consensus could have been reached on the appropriate courses to be taken, with a sound legal basis identified and made public. The fear of reprisals against nationals of the Allied Powers and others at risk by means of even heightened acts of brutality by the Nazis does not seem a sufficient reason for the lack of formulation of a concerted policy which would stand the test of public and subsequent historical scrutiny.

For the time being the hard-line policy of Morgenthau prevailed. At a meeting on 5 September 1944 of the Cabinet policy committee on Germany (Morgenthau, Hull and Roosevelt's confidential adviser, Harry Hopkins), Stimson's proposals were rejected unanimously. The policy of complete destruction of Germany was accepted. In a memorandum from the State Department to the Cabinet committee on Germany, dated 5 September 1944, it was stated:<sup>7</sup>

... Dissolution of the Nazi Party and all affiliated organisations. Large groups of particularly objectionable elements, especially the SS and the Gestapo, should be arrested and interned and war criminals should be tried and executed (emphasis added).

The document was approved without change by the Secretary of State.

With the support of the Cabinet committee apparently assured, on the same day Morgenthau sent a lengthy memorandum to the President, in which he set out details of what became known as the 'Morgenthau Plan'. This simply, and without regard to any legal basis, advocated summary execution of 'arch-criminals', the trial by military commissions of 'certain other war criminals' and the deindustrialisation of Germany.<sup>8</sup>

The response of the Secretary of War was equally swift. On the same day, 5 September 1944, he sent the following memorandum to Morgenthau, with copies to the other members of the Cabinet committee and the President:

It is primarily by the thorough apprehension, investigation, and trial of all the Nazi leaders and instruments of the Nazi system of terrorism such as the Gestapo with punishment delivered as promptly, swiftly and severely as possible that we can demonstrate the abhorrence which the world has for such a system and bring home to the German people our determination to expiate it and all its fruits forever ...

My basic objection to the proposed methods of treating Germany which were discussed this morning was that in addition to a system of preventive and educative punishment they would add the dangerous weapon of complete economic oppression. Such methods, in my opinion, do not prevent war, they tend to breed war.<sup>9</sup>

Two meetings of the Cabinet committee on 5 and 9 September 1944 with the President did not solve the Morgenthau-Stimson deadlock, but on 9 September 1944 the Secretary of War wrote a memorandum to the President, in which, for the first time, a glimmer of 'Nuremberg Law' can be seen. The following extract from the memorandum is significant:

... I am disposed to believe that at least as to the chief Nazi officials, we should participate in an international tribunal constituted to try them. They should be charged with offenses against the laws of the Rules of War in that they have committed wanton and unnecessary cruelties in connection with the prosecution of the war. This law of the Rules of War has been upheld by our own Supreme Court and will be the basis of judicial action against the Nazis.

I have great difficulty in finding any means whereby military commissions may try and convict those responsible for excesses committed within Germany both before and during the war which have no relation to the conduct of the war. I would be prepared to construe broadly what constituted a violation of the Rules of War but there is a certain field, in which I fear that external courts cannot move. Such courts would be without jurisdiction ...<sup>10</sup>

A meeting between Mr. Roosevelt and Mr. Churchill at Quebec in mid-September 1944 was attended by the British Lord Chancellor, Lord Simon, who had prepared a case for 'political execution'. This paper, dated 4 September 1944, was discussed at the meeting. It stated:<sup>11</sup>

3. I am strongly of opinion that the method by trial, conviction and judicial sentence is quite inappropriate for notorious ringleaders such as Hitler, Himmler, Goebbels and Ribbentrop. Apart from the formidable difficulties of constituting the Court, formulating the charge, and assembling the evidence, the question of their fate is a political, not a judicial, question [emphasis in original]. ...

The decision must be 'the joint decision of the Governments of the Allies'. The Moscow Declaration, indeed, has already said so.

.....

The list of war criminals who might be dealt with without trial [my emphasis], which was prepared by the Foreign Secretary, was criticised in some quarters for its omissions, but I am disposed to think that

this method will only be considered appropriate and justified in the case of the small group of leaders who are known to be responsible for the conduct of the war, and who have at headquarters authorised, approved or acquiesced in the horrible atrocities which have been committed.

The significance of Lord Simon's paper was twofold. First, it did not recognise, at a time when the Allied Powers were poised for victory, any question of an International Military Tribunal; rather, it emphasised 'the formidable difficulties of constitution the Court'. Second, Lord Simon expressly preserved the concept of 'shoot on sight' as far as the 'small group of leaders' was concerned.

The result of the Quebec meeting was that the American President and the British Prime Minister finally initialled a summary of the 'Morgenthau Plan' and agreed to send a copy of Lord Simon's paper to Marshal Stalin, with a request that the three Powers jointly prepare a list of top Nazis 'to be dispatched by "summary execution"'.

Morgenthau's seeming victory at Quebec was, however, short-lived. Public pressure and the tide of politics soon forced President Roosevelt virtually to disown the 'Morgenthau Plan'.

By the middle of September 1944 what came to be known as the 'Bernays Plan' was evolved. The author of the plan was Lieutenant-Colonel Bernays, chief of the Special Projects Office of the Personnel Branch (G-1). The 'Bernays Plan' proposed a war crimes trial system before 'an appropriately constituted international court', before which 'the Nazi Government and its Party and State agencies, including the SA, SS and Gestapo, should be charged with conspiracy to commit murder, terrorism and the destruction of peaceful populations in violation of the laws of war'. Colonel Bernays' 'proposed solution' also provided that: <sup>12</sup>

.....

d. The judgment should adjudicate:

(1) That the Nazi Government and its mentioned agencies are guilty as charged.

(2) That every member of the Government and organizations on trial is guilty of the same offense. Such adjudication of guilt would require no proof that the individuals affected participated in any overt act other than membership in the conspiracy.

e. Sentence would be passed by the court on the individual defendants before it.

f. Thereafter, every member of the mentioned Government and organizations would be subject to arrest, trial and punishment in the national courts of the several United Nations. Proof of membership, without more, would establish guilt of participation in the mentioned conspiracy, and the individual would be punished in the discretion of the court. Proof of the commission of other criminal acts would subject the individual to additional punishments conformably to local law.

10. It is particularly noted, in connection with the foregoing

a. That in view of the nature of the charge, everything done in furtherance of the conspiracy from the time of its inception would be admissible, including domestic atrocities against minority groups within Germany, and domestic atrocities induced or procured by the German Government to be committed by other Axis Nations against their respective nationals.

b. That once the conspiracy is established, each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other members thereof.

In that genesis of the London Agreement and Charter, fundamental emphasis was placed on conspiracy and membership of an indicted organisation.

No attempt was made at the time by the author of the plan to justify it from the viewpoint of established principles of international law. The question of its legal basis was simply ignored. Nonetheless, leading

members of the Washington administration obviously saw its adoption as a way out of the impasse which had developed with respect to the 'Morgenthau Plan'. The assistant executive officer, Office of the Assistant Secretary of War (McCloy), Colonel Cutter, was asked to examine the plan. Within a fortnight, Colonel Cutter sent a memorandum to McCloy, in which he described the plan as 'ingenious', but added: <sup>13</sup>

... The proposal however, involves fairly radical departures from existing theories, (i) of individual criminality and criminal responsibility and (ii) of prosecution procedures. It also contemplates one (or a series) of grandiose state trials, which have obvious disadvantages in providing opportunities for the manufacture of national martyrs, giving the defense an effective public platform for use in propaganda, etc.

Recommendation: If the file is to be sent to State and Navy, a clearer indication should be given that the memorandum does not yet represent War Department policy and is merely transmitted as an interesting individual study and suggestion ...

The emergence of the 'Bernays Plan' kept alive the attitude of Secretary of War Stimson, who wrote a lengthy memorandum to Secretary of State Hull, dated 27 October 1944, in which he said: <sup>14</sup>

... The enclosed memorandum ['Bernays Plan'] proposes the prosecution of totalitarianism by trying the organizations which have made total war possible through their coercion of a whole people. It recognizes the unity of criminal purpose in all the acts of Naziism which have carried out the scheme outlined in Mein Kampf. It treats on a parity, and as part of the same conspiracy, both the acts of criminal aggression against neighboring countries and the persecutions of minority groups within enemy territory. I think the proposals set out in the memorandum are worthy of complete investigation and may serve as the basis of an interdepartmental conference on the general war crimes problem, which should be held as soon as possible.

On 9 November 1944, a meeting of representatives of the State, War and Navy Departments was held, presided over by Assistant Secretary of War McCloy. At this meeting agreement 'in principle' was given to the 'Bernays Plan' and the War Department was authorised to prepare a draft memorandum as a basis for further discussion. <sup>15</sup>

Colonel Bernays accordingly prepared a draft memorandum which furnished some detail of the proposal that an indictment should include charges of criminal conspiracy and also should be directed at organisations which the Allied Powers would seek to have declared criminal. The draft memorandum, dated 11 November 1944, was expressed to be from the Secretaries of State, War and Navy to the President. <sup>16</sup>

It was stated in the draft memorandum that 'the objective in the prosecution of Nazi war crimes should be not only to punish the individual criminals, but also to expose and condemn the criminal purpose behind each individual outrage ... the well-recognised principles of the law of criminal conspiracy are plainly applicable, and may be employed'. It was also stated that 'the proceeding will be judicial rather than political. It will rest securely upon traditionally established legal concepts. ... we favour a court constituted by international treaty for the trial of this charge ... in making this recommendation we have given due consideration to the possible difficulties which might arise in the consummation of the necessary treaty. The process of ratification might be time-consuming. When the proposed treaty comes before some ratifying bodies, such as the United States Senate, there might be suggestions of undesirable reservations ... '.

The assertion in the draft memorandum that the proposed proceeding would 'rest securely upon traditionally established legal concepts' was not supported by argument or authority, but no doubt this was not considered necessary at that stage. It probably was also unnecessary to state that there was no precedent in existing international law for the proposal.

The period from November 1944 to 12 April 1945



This period is considered separately because there was a significant change in the development of American war crimes policy when President Roosevelt died on 12 April 1945.

At the beginning of the period, Washington officials were endeavouring to refine the conspiracy/criminal organisation concept as the basis of the trials of war criminals, which was at the heart of the 'Bernays Plan'. That such an attempted refinement exposed legal difficulties is apparent from a memorandum by the Judge Advocate General, Major General Cramer, dated 22 November 1944.<sup>17</sup> It revealed a determination to create, by what Major General Cramer described as a 'treaty provision', legal principles based on the civil law doctrine of res judicata. Two extracts from that memorandum illustrate how far American officials were prepared to go in order to give legal credibility to the 'Bernays Plan'. They were:

1. Although the suggested concept of res judicata goes beyond anything now known to our criminal law, I see nothing in it repugnant to natural justice.
2. ... I see nothing inherently unfair or unjust in trying the organisation in a proceeding where it is defended and represented by its leaders, and in then making that judgment binding on all who voluntarily become members of the organisation.

Major General Cramer concluded: 'Therefore ... I agree in principle with this part of the proposal also' (that is, the 'Bernays Plan').

A draft of a memorandum to the American President, dated 27 November 1944, for the signature of the Secretary of State and the Secretary of War (the Navy Department having indicated, as stated in the draft, that it had a direct interest only in war crimes in the strict sense), shows that by that stage an attempt was being made by Washington officials to crystallise American war crimes policy on the following bases:<sup>18</sup> (extracts from the text of the draft are indicated by quotation marks)

- (a) There should be trial and punishment for 'not only technical violations of the laws and customs of war but also (1) atrocities committed by the Nazis before there was a state of war and (2) atrocities committed by them against their own nationals on racial, religious and political grounds.'
- (b) 'the criminality with which the Nazi leaders and Groups are charged ... represents the results of a purposeful and systematic conspiracy to achieve domination of other nations and peoples by deliberate violation of the rules of war as they have been accepted and adhered to by the nations of the world, the violation of treaties and international conventions and customs, and mass extermination of peoples.'
- (c) Following the adjudication on the conspiracy count 'the civil or military courts of the several United Nations ... would proceed to identify the additional members of the groups thus adjudicated to have been participants in the conspiracy.'
- (d) Two principal types of court could be employed for the trial of conspiracy charges of the character outlined above:

I Tribunal Created by Treaty;

II Military Courts Created by Executive Agreement or Military Arrangement.'

The draft memorandum acknowledged that the British Government had indicated that it favoured neither the treaty process nor the establishment of any international tribunal for the trial of war offences, other than perhaps mixed military courts.

The contents of the draft memorandum, in so far as they differed from the 'Bernays Plan' and various amendments of it, reflected an attempt to accommodate some of the objections to it by high government officers in Washington: for example, first, the assertion that the ultimate objective of the conspiracy was the 'achieving of world domination' raised the issue of the criminality of aggressive war, and, second, that the

tribunal should be established by international treaty in order to avoid criticism that the charges were too radical an innovation and lacked a legal basis.<sup>19</sup>

In the ensuing weeks, the principal factor which led to a hardening of the policy being developed by officials in Washington was the massacre of some seventy American prisoners at Malmedy, Belgium, on 17 December 1944 by German soldiers. American officials and politicians who supported the 'Bernays Plan' used the massacre to strengthen their arguments that a strategy for the punishment of German war crimes should include charges of conspiracy and the criminal conduct of certain specific organisations. The details of these arguments are contained in many of the documents reproduced by Professor Smith.<sup>20</sup>

By contrast, in the early part of the period under consideration doubts about the policy advocated by supporters of the 'Bernays Plan' were expressed in official documents. The principal examples are:-

. A memorandum from Assistant Attorney-General Wechsler to Attorney-General Biddle (later the senior American judge at Nuremberg), dated 29 December 1944, an extract from which is:<sup>21</sup>

... In proposing that the Nazi leaders be prosecuted for the type of conspiracy described above, it is unclear whether the War Department proposal assumes that such a charge has present legal validity under the laws of war or whether some additional legislative definition of the crime is necessary, in the existing state of international law, if the German leaders are to be brought to account in these terms. The proposal that the treaty define the crimes to be punished is itself ambiguous on this point and requires appropriate clarification.

In developing such clarification, the principal difficulty is the fact that some of the elements of the conspiracy charged, (notably violation of treaties, atrocities committed upon German nationals on racial, religious and political grounds and atrocities committed prior to a state of war) are not embraced within the ordinary concept of crimes punishable as violations of the laws of war. For this reason alone, it is desirable that the treaty definition purport not merely to measure the jurisdiction of the tribunal but also to provide the substantive law under which the prosecutions are to be brought. (the writer's emphasis).

In view of the final terms of the London Agreement and Charter, and in the light of the Tribunal's judgment as to the 'Law of the Charter' (I.M.T. Judgment, p. 38), Wechsler's argument was perceptive.

The following memorandum, dated 5 January 1945, by Attorney-General Biddle, in apparent response to the draft memorandum of 27 November 1944, shows the absence of any clarified views among American leaders on fundamental aspects of the proposed retribution:<sup>22</sup>

1. I think we should eliminate, at this point at least, any attempt to punish crimes committed before the war. We will have our hands full with crimes after the war.
2. It seems to me that crimes against German Nationals within Germany should be separated.
3. Consideration should be given to punishment of Italians and Japanese. Any treaty should be drawn broad enough to include both.
4. Can the objects of a treaty to set up an international court be attained by an international agreement, possibly between the military, approved by the various governments.
5. I think the argument that a conspiracy to do a lawful thing is illegal if the overt acts are unlawful and that a conspiracy to do unlawful acts is a crime irrespective of the overt act, is not applicable. The theory is that the crime can be fixed to mean a conspiracy to dominate the world. I doubt whether such a conspiracy is criminal under international law. Aside from that the theory would involve that any overt act is criminal--in other words any soldier fighting to carry out the conspiracy becomes a criminal by

reason of the conspiracy being made criminal. This would entail hopeless confusion.

6. I cannot see how crimes against nationals committed within Germany could be 'pertinent proof' of the conspiracy.
7. I think the court should have no discretion on punishment and consider only cases punishable by death. Where would you find enough jails to imprison?
8. It seems to me that a better approach would be to determine whom you wanted to get at and how many before determining the mechanisms of punishment.
9. In what way are criminal prisoners of war protected under the Geneva conference as the memorandum seems to indicate.
10. How many are proposed to be tried under this plan, by classification?
11. What is the advantage of a mixed military tribunal?
12. I should think that an international court or mixed military tribunal should be used for the punishment only of the leaders--few in number. Devices should be worked out for the punishment of other criminals by very many courts. Is there any way of establishing a group of mixed military tribunals to Punish the large mass of criminals?

Two days earlier President Roosevelt had sent the following cryptic memorandum to the Secretary of State:<sup>23</sup>

Please send me a brief report on the status of the proceedings before the War Crimes Commission, and particularly the attitude of the U.S. representative on offenses to be brought against Hitler and the chief Nazi war criminals. The charges should include an indictment for waging aggressive warfare, in violation of the Kellogg Pact. Perhaps these and other charges might be joined in a conspiracy indictment.

Apparently the attention of the President had not been directed to the following extract from a memorandum prepared in about the middle of December 1944 in the Office of the Judge Advocate General:<sup>24</sup>

... Resort to war is unlawful under the Pact. [The Pact of Paris, 1928] But although international law is violated thereby, it by no means follows that aggressive war is made a crime. The distinction is important if confusion is to be avoided. The usual consequence of the violation of an international obligation is the duty to make reparation for the damage suffered. ...

There was further elucidation of bureaucratic attitudes in a memorandum to the President, dated 22 January 1945, and signed by the Secretary of State, the Secretary of War and the Attorney-General.<sup>25</sup> The document reviewed the major issues and made the following recommendations (in summary form):

That the German leaders and the organisations employed by them ... should be charged both with the commission of their crimes, and also with joint participation in a broad criminal conspiracy, which included and intended these crimes, or was reasonably calculated to bring them about'.

That the trial be conducted in two stages. First, that of leaders before an international tribunal created by 'Executive Agreement', including findings in relation to 'the complicity of the members of the organizations included within the charge'. Second, that 'there would be brought before occupation courts ... individual members of organisations charged with complicity through such membership'. (The detailed recommendation foreshadowed the provisions of the London Charter in relation to the indicted organisations).

'Individual defendants who can be connected with specific atrocities will be tried and punished in the national courts of the countries concerned, as contemplated in the Moscow Declaration'.

The trial of the 'prime leaders' by an international military commission or military court, established by 'Executive Agreement' of the Allied Powers.

Much of the work of Pentagon officers up to the end of January 1945 was directed at the preparation for the President of a statement of the current American official attitude to war crimes policies for use at the conference at Yalta between Mr. Churchill, Marshal Stalin and Mr. Roosevelt: in February 1945. But the issue was not even considered at Yalta and President Roosevelt remained personally uncommitted.<sup>26</sup>

The first attempt at the formulation of a joint war crimes strategy among the Allied Nations took the form of an invitation in March 1945 by the British Government for an American delegation to visit London to discuss the issue. The three members of the delegation were strong supporters of the 'Bernays Plan'. Qualms were still held, although not expressed with precision, about the legal propriety of at least some fundamental parts of that Plan, which were summarised by the expression 'the conspiracy/criminal organisation trial system'. This is shown by the following cablegram sent on 4 April 1945 to the leader of the American delegation, Judge Rosenman, by Ambassador Davies, who was a confidant of President Roosevelt:<sup>27</sup>

I am strongly impressed that there now exists specific law, domestic and international, as well as available judicial machinery entirely adequate to provide and assure speedy and just punishment for outlaws and criminals, whether principals or accessories; and that therefore just punishment can be administered through legalized channels and within recognized principles of law which civilization has evolved, as chief bulwark for protection of the individual against either tyranny or injustice STOP Under vigorous application of present existing law no guilty person can escape STOP To resort to additional retroactive criminal legislation might now appease some who have suffered but would ultimately be condemned by more sober judgment and succeeding generations who would see in it a violation of the principles for which we fought STOP The ideals for which our men have died should not be tarnished by even the shadow of a suspicion that we have stooped to Nazi methods or have tortured legal principle in order to wreak formalized vengeance rather than to administer dispassionate justice under law.

The American delegation could not, however, have been prepared for the British approach that the leader of the British delegation, Lord Simon, proposed at a meeting of delegates on 6 April 1945.<sup>28</sup> It was a superficial compromise between the British proposal that, on the termination of the war, Hitler and his associates should, on identification, be summarily executed, and the American preference for some sort of judicial trial. From a jurisprudential viewpoint, the British proposal is astonishing. At its core was that a 'document of Arraignment' should be prepared in general terms and that 'an inter-allied judicial tribunal (which might include some members who were not professional judges) should be appointed to report upon the truth of this Arraignment after Hitler and Co. had been brought before the tribunal and given the opportunity to challenge the truth of its contents, if they could'. The plan also proposed that the Court would report to the Allies whether the Arraignment or any part of it had been disproved. The Allies themselves would determine what the punishment should be.

It may seem strange that a jurist of the eminence of Lord Simon should state in the document: '... I think that by calling on Hitler and Co. to challenge and disprove, if they can, a carefully drawn document of Arraignment, we would secure the substance of trial before sentence ... The sort of document I have in mind (which would, of course, have to be most carefully settled between the principal Allies) would leave them no loophole'. Lord Simon was careful to say: 'I ought to add that, while I am taking upon myself to send you this description of the plan, I am not writing with the authority of the War Cabinet, though I know that the members of the Government whom I have consulted view the suggestion with favour'.

The American delegation did not reject Lord Simon's proposal outright, but relayed it to Washington with a report on developments in London and the following comment by Colonel Cutter to Assistant Secretary of War McCloy: <sup>29</sup>

'Judge Rosenman generally likes the British proposal, subject to three comments.

(1) He feels a military court and not a civil court should try the six or seven principal leaders.

(2) The court should pass sentence and determine punishment, although possibly subject to later approval by the four EAC [European Advisory Commission members--the four major Allied Powers] Governments through the Control Council (Germany).

(3) There must be adequate documentation of the arraignment instrument, so that to prove the accused guilty, no oral testimony will be necessary.

He also feels that approval of this arrangement should not be given unless, for the trial of others than the 6 or 7 top people, the British approve the common enterprise theory'.

Neither American political leaders nor the British War Cabinet had indicated its decision on the 'document of Arraignment' proposal when it was announced on 12 April 1945 that President Roosevelt had died. On the same day, the British War Cabinet flatly rejected the plan, which 'with its attempted compromise between trial and summary execution had managed to combine the worst of both worlds'.<sup>30</sup>

#### The period from 12 April 1945 to 8 August 1945

One of the most significant of the contemporary documents is a memorandum dated 16 April 1945 by Lord Simon, a copy of which was sent to the leader of the American delegation, Judge Rosenman, and subsequently to the Assistant Secretary of War.<sup>31</sup>

Lord Simon, having been rebuffed by the British War Cabinet on 12 April, repeated in the memorandum of 16 April the British Government's view that 'execution without trial is the preferable course'. He then gave his reasons for this view. The following extract from the memorandum underscores the legal difficulties which Lord Simon envisaged would arise if the war crimes policy took the form of a judicial trial:

... Reference has been made above to Hitler's conduct leading up to the war as one of the crimes on which the Allies would rely. There should be included in this the unprovoked attacks which, since the original declaration of war, he has made on various countries. These are not war crimes in the ordinary sense, nor is it at all clear that they can properly be described as crimes under international law. These would, however, necessarily have to be part of the charge and if the tribunal had--as presumably they would have--to proceed according to international law, an argument, which might be a formidable argument, would be open to the accused that this part of the indictment should be struck out. It may well be thought by some that these acts ought to be regarded as crimes under international law. Under the procedure of trial this would be a matter for the tribunal, and would at any rate give the accused the opportunity of basing arguments on what has happened in the past and what has been done by various countries in declaring war which resulted in acquiring new territory, which certainly were not regarded at the time as crimes against international law.

The final paragraph of the memorandum (the last three sentences of which were omitted from the copy sent to the American delegation) was:

H.M.G. earnestly hope that their Allies will consider the arguments set out above for they are most anxious that a very early agreement should be reached as to the method of dealing with Hitler and his chief associates, and that the method should be one in which the principal Allies concur. It would in any case be valuable if a document could now be drawn up giving the reasoned basis for the punishment of the men concerned. It may be worth consideration whether such a document could not be served upon each of these men (the list will have to be agreed) as soon as possible after his capture. He should then

he told that if he wishes to make any answer he must do so in writing within, say, 14 days, and that his answer will be submitted to the Government in whose charge he was, and that the principal Allies would thereafter promulgate their decision upon his case. This suggested procedure would not be, of course, in the nature of a trial and would not involve the attempt to set up a judicial tribunal, but it would give the accused the opportunity of putting forward what he wished to say, and might conceivably, in some cases, influence the decision.

The proposal in the memorandum involved a concept very similar to the document of Arraignment', which had been rejected by the British War Cabinet.

In contrast to the indecision and vacillation which, while Mr. Roosevelt was President, had marked the American approach to the formulation of a war crimes policy, his successor, Mr Truman, acted swiftly and surely.

On 20 April 1945 a memorandum was prepared in the office of the American Assistant Secretary of War and sent to the Secretary of War, Mr Stimson.<sup>32</sup> It is probably the clearest and most concise statement of the American viewpoint at that date. It anticipated the prosecution arguments at Nuremberg and the Judgment of the Tribunal. Under the sub-heading 'Punishment for Crime Should Only Follow a Judicial Trial', it was stated:

No principle of justice is so fundamental in most men's minds as the rule that punishment will be inflicted by judicial action and only for a violation of existing law which sets a standard of conduct. Judicial punishment is imposed only after notice to the accused of the charges against him, establishment of the facts upon which the charges rest, and an opportunity to defend against the charges, preferably with the advice of counsel. The form in which proof is presented varies from nation to nation. So does the extent of the opportunity to defend, the nature of the hearing, and the incidence of the burden of proof. This principle is applied in greater or less degree by all nations, and historically its recognition is the first step in the approach to the democratic standard of liberty under law.

The dye was cast, so far as America was concerned, when, on 1 May 1945, President Truman issued an executive order creating an American war crimes prosecution agency and designating Supreme Court Justice Jackson as 'Chief of Counsel'.<sup>33</sup>

By about the end of April 1945, and on the virtual eve of the United Nations Conference at San Francisco, the stage was set for positive American action. The Third Reich was on the brink of total collapse; many concentration camps had been overrun by the Allied armed forces; Hitler and Goebbels had committed suicide; and the unconditional surrender of the German Reich and its, army, naval and air forces was imminent. A lengthy 'Memorandum of proposals for the prosecution and punishment of certain war criminals and other persons' had been prepared.<sup>34</sup> It obviously was designed to impress the British Government and bring about the abandonment of that Government's plan for political execution of the principal Nazi leaders. It was drafted and revised over the period 25 to 30 April 1945. It contained little that was new.

Further revisions of the memorandum were made prior to the San Francisco conference. Most were matters of detail and are not significant in this survey. The most important development in early May 1945 was the preparation of a draft 'executive agreement', the first such document officially produced.<sup>35</sup> There is little point in analysing this document in detail, because it was revised many times and was ultimately replaced by the London Agreement and Charter of 8 August 1945. However, from the viewpoint of the legal validity of the London Agreement and Charter, it is significant that the first published draft of an 'executive agreement' asserted the right of the Allied Powers to bring to trial Nazi war criminals for the following criminal acts:

- a. Violation of the customs and rules of warfare.
- b. Invasion by force or threat of force of other countries in violation of international law or treaties.
- c. Initiation of war in violation of international law or treaties.

- d. Launching a war of aggression.
- e. Recourse to war as an instrument of national policy or for the solution of international controversies.

The Memorandum and the draft 'executive agreement' were presented to the representatives of the Allied Powers at the San Francisco Conference on 3 May 1945. Although no formal agreement was reached at San Francisco, the British Foreign Secretary, Mr. Eden, in accordance with the instructions given to him by the British War Cabinet, 'yielded in principle'. Thereafter, there was no scope for the British proposal for execution of Nazi leaders without trial. The American proponents of the 'conspiracy/criminal organisation' plan, supported by the expressed views of the Russian and French Governments, had successfully isolated Britain.

In the remaining three months until 8 August 1945, the 'executive agreement' was further revised and became the basis for the discussions in London in June, July and August 1945 between representatives of the Allied Powers, leading to the signature on 8 August of the London Agreement and Charter of the International Military Tribunal.

The discussion in this chapter has involved a chronological examination of the basic documents to which the development of 'Nuremberg Law' may be traced. To the extent to which such examination is essentially historical, rather than legal, it is emphasised that it is considered necessary to state the essence of the documentary evidence, because a legal judgment on 'Nuremberg law' can only be made fully and fairly against such a background.

#### THE LAW AS PROPOUNDED BY AMERICAN PROSECUTORS IN JUNE 1945 (AS DOCUMENTED)

It remains to consider in this chapter two other documents: first, a document prepared by Colonel Taylor (as he then was), dated 'early June, 1945'<sup>36</sup>; and, second, a report of Mr. Justice Jackson to President Truman released by the White House on 7 June 1945. Colonel Taylor wrote Document 58 very soon after his appointment as assistant to Mr. Justice Jackson. The following significant paragraphs of Document 58 read:

#### 'ILLEGAL LAUNCHING'

... This phase of the case is based on the assumption that it is, or will be declared, a punishable offense to plan and launch (and lose?) an aggressive war, particularly if treaties are thereby violated. Although the phrase 'illegal launching' is a 'law idea', and although much legal paraphernalia will be and must be invoked to validate the assumption, the thing we want to accomplish is not a legal thing but a political thing. Its accomplishment depends on persuading the several participating nations to, take the political step of committing themselves to this doctrine. Whether the doctrine is presently a judicially valid doctrine is an interesting question, and there will be much interesting and stimulating discussion thereon, but the question will be settled by political acts of the several nations, not by argument before and judicial decision by a tribunal, though such argument and judicial decision might influence the political decision.

... Ex Post Facto--Not, I believe, a bothersome question if we keep in mind that this is a political decision to declare and apply a principle of international law. It is the governments and people of the participating nations, and not the tribunal, who must be convinced that the principle is valid. Only the most incorrigible legalists can pretend to be shocked by the conclusion that the perpetrator of an aggressive war acts at peril of being punished for his perpetration, even if no tribunal has ever previously decided that perpetration of aggressive war is a crime. And, in any event, the ex post facto question is rendered much easier by the fact of treaty violations, and by the existence of numerous

speeches and writings of wise and important men who have been saying for years that: it is criminal to launch an aggressive war. Even though no judicial mechanism has heretofore existed to punish the leaders of large nations which violate treaties, a man who violates a treaty must act at peril of being punished by the offended party's employing self-help. The fact that the self-help happens to involve the declaration of a new principle of international law affords the perpetrator no additional ground of complaint.

Many of the atrocities committed by the defendants can be shown to violate international law, the rules of war, or the laws of Axis or Axis-occupied countries. Wherever possible we should show that the atrocity was committed in violation of previously established law or rule. But if such cannot be established, we need not shy off because of ex post facto. No one will be shocked by the doctrine that people who direct or do inhuman and barbarous things in the course of losing a war will be punished. Many would be shocked by the conclusion that such people may go scot-free unless a pre-existent law or rule can be cited. For convenience, however, we may speak of 'crimes' where we have a pre-existent rule available and 'atrocities' where we are not so sure ...

The views expressed by Colonel Taylor in the cited extracts are fundamental in any judgment as to the validity of 'Nuremberg Law'.

Within five weeks of his appointment as Chief of Counsel for the United States in prosecuting the principal Axis War Criminals, Mr. Justice Jackson submitted a report to the American President, which was released on 7 June 1945. Parts of that report relate to the legal basis of the proposed Nuremberg trials. They are reproduced as follows because they explain the American attitude, as revealed by documents which have been considered in this chapter:

The legal position which the United States will maintain, being thus based on the common sense of justice, is relatively simple and non-technical. We must not permit it to be complicated or obscured by sterile legalisms developed in the age of imperialism to make war respectable.

Doubtless what appeals to men of goodwill and common sense as the crime which comprehends all lesser crimes, is the crime of making unjustifiable war. War necessarily is a calculated series of killings, of destructions of property, of oppressions. Such acts unquestionably would be criminal except that International Law throws a mantle of protection around acts which otherwise would be crimes, when committed in pursuit of legitimate warfare. In this they are distinguished from the same acts in the pursuit of piracy or brigandage which have been considered punishable wherever and by whomever the guilty are caught. But International Law as taught in the Nineteenth and the early part of the Twentieth Century generally declared that war-making was not illegal and is no crime at law. Summarized by a standard authority, its attitude was that 'both parties to every war are regarded as being possessed of equal rights'. This, however, was a departure from the doctrine taught by Grotius, the father of International Law, that there is a distinction between the just and the unjust war - the war of defense and the war of aggression.

#### The Nature of International Law

International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the common law, through decisions reached from time to time in adapting settled principles to new situations. Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct. After the shock to civilization of the Last World War, however, a marked reversion to the earlier and sounder doctrines of International Law took place. By the time the



Nazis came to power it was thoroughly established that launching an aggressive war or the institution of war by treachery was illegal and that the defense of legitimate warfare was no longer available to those who engaged in such an enterprise. It is high time that we act on the juridical principle that aggressive war-making is illegal and criminal.

## CONCLUSION

Two matters are clear from the foregoing survey of documents. First, American political and bureaucratic policies were the determining factors in the formulation of the principles upon which the London Agreement and Charter were based. Second, Great Britain was, on the day of Germany's surrender, no closer to the development of practicable, concrete proposals for the trial of war criminals than it had been immediately after the cessation of hostilities in the First World War. In particular, British political leaders and their advisers had, at that date, failed to enunciate with any precision the principles of international law upon which it was to rely so strongly at Nuremberg. Thereby, they left the way open for the adoption and application of American policies which, almost exclusively, were to become the basis for 'Nuremberg Law'. More importantly, the negative approach of the British Government exposed it to the criticism that it was a party to the London Agreement and Charter more by default than by reason of its desire to apply to the trials of Axis' war criminals legal principles in respect of crimes against peace and crimes against humanity, which it could, and did, argue were accepted as being an integral part of, and of binding force in, international relations.

## NOTES

1. Most of the references to documents in this chapter are derived from Professor Bradley F. Smith, The American Road to Nuremberg, 1982, and his citations from the Walter Bedell Smith Collection of World War II Documents, Dwight D. Eisenhower Library, Abilene, Kansas. This reference is to p. 14 of that work.
2. Ibid., pp 15-16
3. Ibid., pp. 16-17.
4. Ibid., pp. 17-20.
5. Diaries of Henry L. Stimson, 25 August 1944, vol. 48, p. 22, roll 9, Yale University, U.S.A.
6. The Morgenthau Diary (Germany), 2: pp. 443-444. See also Smith, op. cit., Document 7, pp. 20-21 and Document 9, p. 23.
7. Smith, op. cit., p. 27.
8. The Morgenthau Diary (Germany), 2: pp. 105-108.
9. Smith, op. cit., p. 30.
10. Ibid., pp. 30-31.
11. Ibid., pp. 31-32 and notes 1-4 on p. 227.
12. Ibid., pp. 36-37.
13. Ibid., pp. 37-38.
14. Ibid., p. 40.
15. Ibid., p. 11.
16. Ibid., p. 11, pp. 41-44.
17. Ibid., pp. 58-61.
18. Ibid., pp. 61-67.
19. Ibid., p. 12.
20. Smith, op. cit., passim.
21. Ibid. pp. 84-90.
22. Ibid. pp. 91-92 and p. 235 (footnotes 1 and 2 to document 28).
23. Ibid. p. 92.
24. Ibid. pp. 78-84

25. Ibid. pp . 117-122 .
26. See Hans-Jurgen Schlochauer, Yalta Conference ( 1945), E.P.I.L., vol. 4, pp. 358-363.
27. Smith, op. cit., p. 147. For some detailed amendments of the American plan, see Smith, op. cit., Document 34, pp. 147-149.
28. Ibid., pp. 149-152.
29. Ibid., p. 155.
30. Ibid., pp. 137-138.
31. Ibid., pp. 155-157, and p. 243 (note 4, document 48).
32. Ibid., pp. 158-161.
- 33 . Executive Order 9547, The White House, 2 May1945. F.R . Doc .45-7256.
34. Smith, op. cit., pp. 162-172. (Document 50).
35. Ibid., pp. 181-187.
36. Ibid., pp. 209-212 (Document 58). Colonel Taylor, later Brigadier General Taylor, assumed control of the prosecution in Germany of the Axis war criminals after the conclusion of the sittings of the International Military Tribunal on the return to the United States of Mr. Justice Jackson. He later wrote many articles and books, including Nuremberg and Vietnam: An American Tragedy, New York Times Company, 1970, and became a Professor of Law in New York.

## CHAPTER 7 ANALYSIS OF THE LONDON AGREEMENT AND THE CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, 8 AUGUST 1945

The year 1945 was marked by the emergence of a new declaration of the scope of international criminal law. As discussed in Chapter 6, the declaration crystallised in that year after a long period of indecision. There had been many months of disputation within the United States of America and between America and Great Britain as to the appropriate method of giving practical effect to the political warnings by the Allied Powers to the Axis leaders. Several weeks had been occupied in discussions in London in June and July between representatives of the major Allied Powers. The result was the signature, on 8 August 1945, by representatives of the Governments of Great Britain, the United States, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics, of an 'agreement' for the prosecution and punishment of the major war criminals of the European Axis, in which was embodied, expressly as an 'integral part' of the Agreement (Article 2), the Charter of the International Military Tribunal.

It is not intended in this chapter to examine comprehensively the Agreement and Charter so far as their juridical soundness is concerned: this will be considered in Chapter 18. It is proposed, however, to analyse the provisions of the Agreement and Charter as a preliminary step in evaluating the indictment (which, pursuant to such provisions, was presented to the International Military Tribunal at Berlin on 18 October 1945), the subsequent trial at Nuremberg and the judgment of the Tribunal.

The Agreement was a concise and lucid document. Its preamble set out the essence of the Moscow Declaration of 30 October, 1943. It also declared that the signatories, in concluding the Agreement, were 'acting in the interests of all the United Nations'. The Agreement was confined to 'the major war criminals of the European Axis'. There followed seven Articles, each brief and simply expressed:

1. There shall be established after consultation with the Control Council for Germany an International Military Tribunal for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities.
2. The constitution, jurisdiction and functions of the International Military Tribunal shall be those set out in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.
3. Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavours to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.
4. Nothing in this Agreement shall prejudice the provisions established by the Moscow Declaration concerning the return of war criminals to the countries where they committed their crimes.
5. Any Government of the United Nations may adhere to this Agreement by notice given through the diplomatic channel to the Government of the United Kingdom, who shall inform the other signatory and adhering Governments of each such adherence.<sup>1</sup>
6. Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any Allied territory or in Germany for the trial of war criminals.
7. This Agreement shall come into force on the day of signature and shall remain in force for the period of one year and shall continue thereafter, subject to the right of any Signatory to give, through the diplomatic channel, one month's notice of intention to terminate it. Such termination shall not prejudice any proceedings already taken or any findings already made in pursuance of this

### Agreement.

The twenty four original defendants were charged in the indictment both individually and as members of any of the named groups or organisation to which they belonged. The pleading in the indictment in this respect was proper by reason of the combination of Articles 1 and 2 of the Agreement and Article 9 of the Charter.

The precise character of the Nuremberg Tribunal has been discussed by numerous writers. The description 'Military' was adopted in Article 1 of the Agreement and maintained throughout it and the Charter. It was an appropriate designation.<sup>2</sup> Neither document imposed any restriction in respect of the Tribunal's membership. As it happened, the members of the Tribunal, including alternates, were eminent judges or jurists in their own countries. It may have been prudent to have included in the membership of the Tribunal representation of the Armed Forces of the principal Allied Powers, or at least to have provided that such representatives should sit as assessors, in accordance with established practice in English law. However, the actual composition of the Tribunal has not attracted any significant criticism, apart from the claim that all the members were representatives of the victorious nations, sitting in judgment only on the vanquished.<sup>3</sup>

Article 4 of the Agreement should be examined together with the preamble. Although Article 4 did not have any legal relevance to the Nuremberg trial, it is questionable whether it was justifiable to refer to 'the provisions established by the Moscow Declaration'. The Moscow Declaration lacked any substantial legal effect in itself. It was made at a time when the tide of war had begun to turn against the Axis Powers. Couched as it was in emotive language, which is often resorted to by political leaders, it should be understood for what it was: that is, a political statement for use as propaganda. It did not 'establish' any principle of international law, nor was it, at the time, based on any such existing principle.

No doubt Article 4 of the Agreement should be interpreted simply as stating that the Agreement did not prevent individual states taking measures for the return of war criminals for trial in accordance with the lex loci.

The Moscow Declaration should be regarded as a declaration by three allied heads of State supportive of asserted principles of international law, thereby confirming those principles but not establishing them. It should be noted that in the second paragraph of the preamble to the Agreement the word 'stated' is used with reference to the Moscow Declaration.<sup>4</sup>

Some of the Articles of the Charter are briefly referred to in this chapter, although a more particular examination of them, as part of a legal analysis, is made in Chapter 18.

Article 1 of the Charter provided:

In pursuance of the Agreement signed on the 8th August 1945 ... there shall be established an International Military Tribunal ..., for the just and prompt trial and punishment of the major war criminals of the European Axis.

This provision was unnecessary in its terms, as Article 1 of the Agreement provided for the establishment of the Tribunal. Moreover, there is some verbal inconsistency between the provisions of Article 1 of the Agreement and Article 1 of the Charter, although the inconsistency was not of legal significance. Of course, both documents must be read together, because the Charter was declared to be an integral part of the Agreement.

Article 3 provided:

Neither the, Tribunal, its members nor their alternates can be challenged by the prosecution, or by the Defendants or their Counsel. Each Signatory may replace its member of the Tribunal or his alternate for reasons of health or for other good reasons, except that no replacement may take place during a trial, other than by an alternate.

It was not made clear what the words 'can be challenged' precisely meant. They could have referred to any or all of the following:

The legal standing of the members of the Tribunal or their alternates.

Bias, because, in the events which happened, all members were representatives of the victorious Allied Powers.

The unfitness of Russia to be a participant, because of her action in waging war against Poland and her record of violations of the laws and customs of war.

The unfitness of the United States of America to sit in judgment, because some writers claimed it had taken, in breach of her obligations as a neutral Power, effective steps to aid Britain militarily, far in advance of the German declaration of war against it.

The Tribunal did not expand on the interpretation of the provisions of Article 3 in an early ruling.<sup>5</sup>

Article 6 was the most contentious provision in the Charter. It read:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:-

- (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

The first paragraph of this Article referred only to the trial and punishment of persons. It did not include a reference to the declaration of a group or organisation as a criminal organisation (Article 9). The third paragraph of the Article was, from the viewpoint of the prosecution, essential in order to embrace all those involved in the common plan. However, the language used was loose. The words 'by any persons' should have been followed by the words 'party to the common plan or conspiracy'. Without these additional words, it is arguable that the provisions of the third paragraph, as a matter of construction, went beyond accepted principles of the law of

criminal conspiracy.

The inclusion in sub-paragraph (b) of paragraph 2 in the definition of 'war crimes' of the words 'wanton destruction of cities, towns or villages, or devastation not justified by military necessity' was apt to attract criticism, in view of the record of the Allied Powers in aerial attacks on civilians: for example, at Hamburg and Dresden, and the use of atomic bombs against the Japanese cities of Hiroshima and Nagasaki.

The use of the words in sub-paragraph (c) 'before or during the war', was controversial. The Tribunal ruled, however, that in order to constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. It said that this had not been satisfactorily proved.<sup>6</sup>

There can be no doubt that Count 1 of the indictment ('the common plan or conspiracy to commit Crimes against Peace, War Crimes and Crimes against Humanity'), especially since it necessarily was based on Article 6 of the Charter, caused confusion during the trial. Such confusion has lingered on since the trial ended. For example, Professor Bradley Smith has stated:<sup>7</sup>

The introductory passage [that is, the first paragraph of Article 6] did include the statement that the Tribunal was empowered to try and judge persons either 'as individuals or as members of organisations' but conspiracy was not listed as a separate offense. Instead there were merely three prosecutable offenses: "Crimes Against Peace", "War Crimes" and "Crimes Against Humanity" (emphasis added).

Such a construction of Article 6 is disputed. It is too narrow, especially the statement that the Article merely provided for 'three prosecutable offenses'. In the writer's view, sub-paragraph (a) of the second paragraph of Article 6 authorised jurisdiction in respect of three separate crimes, namely:-

- (1) The crime of planning, preparation, initiation or waging of a war of aggression;
- (2) The crime of planning, preparation, initiation or waging of a war in violation of international treaties, agreements or assurances; and
- (3) The crime of participation in a common plan or conspiracy for the accomplishment 'of any of the foregoing': that is, any crime within (1) or (2) above.

However, the crime of 'participation in a common plan or conspiracy' was not included in either sub-paragraph (b) or sub-paragraph (c) of the second paragraph of Article 6. It may be that the omission was accidental and due to the fact that the Charter was subject to substantial redrafting and amendment, but the document must be construed in accordance with the plain and natural meaning of its provisions. Accordingly, it is argued that:

- (1) Article 6 provided for five, and not only three, different and separate crimes (treating separately the two disjunctively expressed crimes defined in the opening lines of Article 6 (a): that is, from the word 'planning' to the word 'assurances', inclusive).
- (2) Article 6 of the Charter authorised a charge of 'participation in a common plan or conspiracy' so far only as the first two categories of the extended statement of 'crimes against peace' were concerned: that is, 'planning, preparation, initiation or waging' of either a war of aggression or a war in violation of international treaties, agreements or assurances.<sup>8</sup>
- (3) The Charter did not, within the terms of sub-paragraph 6 (a), purport to authorise a charge of conspiracy in respect of 'war crimes' (sub-paragraph (b) of the second paragraph of Article 6) or 'crimes against humanity' (sub-paragraph (c) of the second paragraph of Article 6).
- (4) If it had been intended that the conspiracy charge should extend beyond crimes against peace, it would have been a simple drafting matter to have omitted from sub-paragraph (a) of the second paragraph of Article 6 the words 'or participation in a common plan or conspiracy for the accomplishment of any of

the foregoing' and to have used the same words in a new, additional sub paragraph (d) in that Article, with any necessary consequential rearrangement.

- (5) By way of emphasis, the last paragraph of Article 6 did not purport to create a crime of participating in a common plan or conspiracy to commit a crime other than those expressed in sub-paragraph (a) of the second paragraph of the Article: that is, the two categories of 'crimes against peace' therein stated.

Article 7 excluded the applicability of the 'Heads of State doctrine' in these terms:

The official position of defendants, whether as Heads of State or responsible officials in Government Departments shall not be considered as freeing them from responsibility or mitigating punishment.

Article 8 made the defence of superior orders unavailable. It read:

The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Articles 9 and 10 (to which Article 11 was supplementary) contained the following provisions relating to the indicted organisations:

9. At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation. After receipt of the indictment the Tribunal shall give such notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.
10. In cases where a group or organisation is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.

Articles 9, 10 and 11 were extremely controversial, especially from the viewpoint of ex post facto. A legal analysis of them is included in Chapter 18.

Articles 12 to 25 prescribed detailed procedural matters which were, in accordance with Article 13, supplemented by the Tribunal's Rules of Procedure of 29 October, 1945. Two only of those Articles merit specific mention.

Article 15(c) provided that the Chief Prosecutors should undertake:

- (c) ... the preliminary examination of all necessary witnesses and of the Defendants.

That procedure was an established part of Continental law, but not of Anglo-American law. Therein was illustrated the diversity of the jurisprudential approach adopted in the 'law of the Charter'.

Article 17(b) authorised the Tribunal 'to interrogate any Defendant'. It is not clear what the word 'interrogate' means in that provision. In Article 17(a) the Tribunal was given power 'to put questions' to witnesses. Presumably, the divergence in language imports a distinction. Throughout the trial, the word 'interrogation'



was used in relation to witnesses, or potential witnesses, in the normal use of that word in a formal sense. The transcript of the trial proceedings does not appear to indicate that the Tribunal 'interrogated' any accused in the formal sense, although, of course, members of the Tribunal from time to time, but not excessively, asked questions of the accused and of witnesses in open sessions of the Tribunal.

Leaving aside at this stage any detailed legal analysis of the Agreement and Charter, and examining them only from the viewpoint of the basis for the indictment, they should be regarded as well-drafted documents, despite minor criticism to which each may be vulnerable.

Considered together, the Agreement and Charter had the form and substance of a legislative enactment. They were executed within three months of the surrender of the German Armed Forces. They involved an accommodation of divergent views among the Allied Powers; in particular, they were an assertion of the Rule of Law, as against the British notion of summary execution. They therefore should be regarded, in themselves, as a salient contribution to the development of international law. However, it must be borne in mind that, apart from the three accused who were found not guilty of all charges against them, the fate of the accused was really sealed by the terms of the Agreement and Charter, which, in the words used by the Tribunal in its judgment, were 'decisive and binding' on it.

## NOTES

1. The nineteen adhering countries were: Greece, Denmark, Yugoslavia, the Netherlands, Czechoslovakia, Poland, Belgium, Ethiopia, Australia, Honduras, Norway, Panama, Luxembourg, Haiti, New Zealand, India, Venezuela, Uruguay and Paraguay (see The Charter and Judgment of the Nuremberg Tribunal, History and Analysis, memorandum submitted by the Secretary General, United Nations--General Assembly, International Law Commission, New York, 1949, p. 3).
2. In an article published in June 1944 while he was a member of the staff of the Judge Advocate General's Department of the United States Army, Major W.B. Cowles wrote: 'A military tribunal with mixed inter-allied personnel may properly be established by the commanding general of co-operating cobelligerent forces ... In the United States, the personnel of military commissions have usually been commissioned officers. There is, however, no legal objection to the use of qualified civilians'. (Trial of War Criminals by Military Tribunals, (1944) 30 American Bar Association Journal, p. 330). For a discussion of the character of the Tribunal, see Chapter 18.
3. For example, see G.A. Finch (Editor-in-Chief), The Nuremberg Trial and International Law, (1947) 41 A.J.I.L., pp. 20-37, at p. 35.
4. In E.P.I.L., vol. 7, p. 67, Dr. Carl-August Fleischhauer gives the following description of a Declaration for the purposes of public international law: 'Declaration is a means by which States and other subjects of international law express their will, their intent or their opinion when acting in the field of international relations. It is in essence a unilateral act by one State or a joint statement issued by several States through a conference or through an international organisation'. Although this definition does not refer to criminal international law, there is no basis to suppose that the concept of a 'declaration' would be any more extensive in criminal matters than in civil matters.
5. On the second day of the trial, 21 November 1945, the President of the Tribunal said: 'A motion has been filed with the Tribunal and the Tribunal has given it consideration. In so far as it may be a plea to the jurisdiction of the Tribunal, it conflicts with Article 3 of the Charter and will not be entertained'. (No specific reference was then made to the motion nor was it then identified in the transcript). Official transcript, 21 November 1945, p. 1. For the terms of the motion, see Chapter 17.
6. I.M.T. Judgment, p. 65.
7. Smith, Reaching Judgment at Nuremberg, Basic Books Inc., New York, 1977.
8. The emphasised word 'or' also was emphasised in the Judgment of the I.M.T., p. 42.

## CHAPTER 8 THE NUREMBERG INDICTMENT

### INTRODUCTION

In this chapter an analysis is made, as a matter of law, of the four Counts of the Nuremberg indictment. The formal correctness, in law, of the Counts, in the light of the provisions of the London Agreement and Charter, is obviously of fundamental relevance to the jurisdiction of the Tribunal and, as a consequence, to the validity of its individual findings against the accused within the terms of Part VI of the Charter.

Such an analysis does not involve at this stage any consideration of the state of established international law at 8 August 1945, but rests upon the relevant provisions of the Agreement and Charter and, where necessary, the application of such legal principles of practice and procedure as are recognised as appropriate in the legal systems of civilised nations, subject to the express or implied provisions of the Agreement and Charter.

The analysis is made with due regard to the provisions in Article 16 of the Charter, designed to ensure a fair trial for the defendants. Moreover, the analysis is essentially independent of the merits of any individual case.

Scant reference has been made in this chapter to sources, because authors and writers have not, to any appreciable degree, focussed attention on the detailed examination of the indictment in a strictly legal and formal sense.

### GENERAL PERSPECTIVE OF THE INDICTMENT

Against the background of the London Agreement and Charter, the indictment,<sup>1</sup> which covered 50 closely printed pages, must be regarded technically as superficially a well-ordered example of criminal pleading, despite the criticisms to which it is open and despite some blemishes. It resembled the type of document which was familiar to English and American trial lawyers. The draftsmen of it took full advantage of the scope afforded by the London Agreement and Charter, and produced a document which set out the case of the Allied Powers against the defendants with clarity (although some legal misconceptions can be identified) and in the most comprehensive detail. The British Deputy Chief Prosecutor, Sir David Maxwell-Fyfe, claimed that 'the indictment contains more full particulars than probably any other indictment in the history of jurisprudence'.<sup>1a</sup>

In the light of the protracted negotiations which preceded the London Agreement and Charter, it was a remarkable achievement for the representatives of the Allied Powers to have been able to sign the indictment in English, French and Russian on 6 October 1945—less than two months after the execution of the London Agreement and Charter—and present it to the Tribunal in Berlin on 18 October 1945.

According to Professor Bradley Smith,<sup>2</sup> an Anglo-American sub-committee began the drafting of an indictment in London in June 1945. In Reaching Judgment at Nuremberg, Professor Smith gives a detailed account of the negotiations between representatives of the Allied Powers, which culminated in the signing of the indictment.<sup>3</sup> The account is essentially historical, but from it the following matters are clear:-

The negotiations were marked by continuing disagreement between the national representatives with respect to the number and identity of the defendants to be charged, the broad legal objectives which should find expression in the indictment, and the scope of the trial which would follow. The British sought a simple indictment, a narrow evidentiary compass and a short trial, whereas the Americans consistently argued for a substantial trial, with multiple charges and a large number of defendants.

The Americans never deviated from the concept of the original 'Bernays Plan', with its concentration on a 'conspiracy/criminal organisation' theory.

The American approach prevailed and was reflected in the indictment largely because of the persistent

and strong advocacy of the theory by the American delegation and the lack of concert between the other three major Powers. The first British indictment plan, proposed in mid-July 1945, which was in draft form, including a tentative list of defendants, covered only two and a half pages. Despite the fact that the indictment was signed on 6 October 1945, it was not until 9 October that the British Cabinet gave its assent to the inclusion of 'the General Staff and High Command of the German Armed Forces' among the organisations in respect of which a declaration of criminality would be sought from the Tribunal (Article 9 of the Charter).

Professor Smith comments that, because of the precautionary attitudes of the representatives of all four nations, 'coupled with the enormous problems and the short time available', it was guaranteed 'that the result would not be simple and tidy'.<sup>4</sup> The criticism that the resulting indictment was not 'tidy' is hard to justify. Legal drafting is an art. The aim should be to produce a document which is concise, as simple as the particulars alleged will permit and which is easily understood, despite the detail in, and breadth of, the particulars. An experienced legal draftsman would have to concede that this aim was achieved in the drafting of the Nuremberg indictment.

## COUNT 1—THE COMMON PLAN OR CONSPIRACY

The first Count in the indictment under the above heading (with a subheading 'Charter, Article 6, especially 6(a)' alleged that

all the defendants, with divers other persons, during a period of years preceding 8th May 1945, participated as leaders, organizers, instigators or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes and crimes against humanity, as defined in the Charter of this tribunal, and, in accordance with the provisions of the Charter, are individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy.

The significance of the cited extract from the 'Statement of the Offense' lies in the fact that the American prosecutors had been able to place the essence of the 'Bernays Plan' in the forefront of the indictment and to support Count 1 by a wealth of particulars which covered ten printed pages. The particulars of 'the nature and development of the common plan or conspiracy' were pleaded under seven sub-headings:

Nazi Party as the central core of the common plan or conspiracy.

Common objectives and methods of conspiracy.

Doctrinal techniques of the common plan or conspiracy.

The acquiring of totalitarian control of Germany: political.

The acquiring of totalitarian control in Germany: economic; and the economic planning and mobilization for aggressive war.

Utilization of Nazi control for foreign aggression.

War crimes and crimes against humanity committed in the course of executing the conspiracy for which the conspirators are responsible.

The indictment continued:

3. By reason of all the foregoing, the defendants with divers other persons are guilty of a common plan or conspiracy for the accomplishment of Crimes against Peace; of a conspiracy to commit Crimes against Humanity in the course of preparation for war and in the course of prosecution of war; and of a conspiracy to commit War Crimes not only against the armed forces of their enemies but also against non-belligerent civilian populations.

Appendix A of the indictment was a statement of the alleged individual responsibility of the original twenty four defendants for the crimes charged in all four Counts.

Appendix B of the indictment was a statement in which were named each Group or Organisation which it was alleged should be declared criminal, together with particulars of the factual matters which would be relied upon in support of the allegation.

Appendix C of the indictment contained several pages of 'Charges and Particulars of Violations of International Treaties, Agreements and Assurances Caused by the Defendants in the Course of Planning, Preparing and Initiating the Wars'.

As discussed in Chapter 7, Article 6 (a) of the Charter alleged to be criminal the participation in a common plan or conspiracy 'for the accomplishment of any of the foregoing': that is 'Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances'. It did not purport to confer jurisdiction on the Tribunal to determine charges of conspiracy to commit, or which involved the commission of, war crimes or crimes against humanity.

Nevertheless, Count 1 of the indictment charged 'a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes and Crimes against Humanity, as defined in the Charter of this Tribunal'.

The particulars under Count 1 related primarily to Crimes against Peace (some eight pages). In two paragraphs near the end of the particulars, the indictment alleged the facts upon which the prosecution relied to support the charge of a common plan or conspiracy to commit war crimes and crimes against humanity. The two paragraphs were:

**(G) WAR CRIMES AND CRIMES AGAINST HUMANITY COMMITTED IN THE COURSE OF EXECUTING THE CONSPIRACY FOR WHICH THE CONSPIRATORS ARE RESPONSIBLE**

1. Beginning with the initiation of the aggressive war on 1st September, 1939, and throughout its extension into wars involving almost the entire world, the Nazi conspirators carried out their common plan or conspiracy to wage war in ruthless and complete disregard and violation of the laws and customs of war. In the course of executing the common plan or conspiracy there were committed the War Crimes detailed hereinafter in Count Three of this Indictment.

2. Beginning with the initiation of their plan to seize and retain total control of the German State, and thereafter throughout their utilization of that control for foreign aggression, the Nazi conspirators carried out their common plan or conspiracy in ruthless and complete disregard and violation of the laws of humanity. In the course of executing the common plan or conspiracy there were committed the Crimes against Humanity detailed hereinafter in Count Four of this Indictment.

There followed paragraph 3 (already cited).

Count 1, and the total particulars thereunder, was a conglomerate Count which, in effect, brought together, in so far as a common plan or conspiracy was concerned, the whole of the facts pleaded in respect of the totality of the four Counts; in particular, it made admissible in respect of Count 1 evidence of all of the alleged facts relied on by the prosecution, not only in respect of Count 1, but also in relation to Counts 2, 3 and 4.

The importance of this conglomeration is evident from the judgment of the Tribunal and the fate of the defendants. All the twenty two who were tried at Nuremberg were charged under Count 1. Only eight were

convicted under that Count and 14 were found not guilty; of the eight, six were found guilty on all four Counts and two were convicted on at least one other Count (Hess, Count 2; Raeder, Counts 2 and 3).

Count 1 was, as a matter of pleading, fundamentally defective in that it charged conspiracy in relation to war crimes and crimes against humanity contrary to the Charter, which confined the Tribunal's jurisdiction in respect of conspiracy to the two categories of crimes against peace as defined in Article 6 (a). The Tribunal did not have jurisdiction to hear evidence, and determine guilt, in relation to Count 1 as pleaded. It had, by virtue of Article 2 of the Agreement, the jurisdiction 'set out in the Charter'. Article 6 of the Charter conferred jurisdiction relating to conspiracy only within the terms of Article 6 (a), but this did not extend beyond a common plan or conspiracy 'for the accomplishment' of the defined two categories of crimes against peace.

The conflict between Count 1 and the Agreement and Charter was not merely technical. It was substantive and fundamental. The approach of the American prosecution was unequivocal. Major Wallis, Assistant Trial Counsel, said on the third day of the trial, in presenting briefs and documents relevant to Count 1:<sup>5</sup>

The Charge in Count One is that the defendants, with divers other persons, participated in the formulation or execution of a Common Plan or Conspiracy to commit, or which involved the commission of, Crimes against Humanity (both within and without Germany), War Crimes, and Crimes Against Peace.

Primary responsibility for presenting the evidence supporting Count was, by agreement between the prosecutors, assumed by the American counsel. In doing so, Mr. Alderman, Associate Trial Counsel, read the commencing words (cited above) of the Statement of the Offense (paragraph III) in the indictment but omitted any reference to war crimes or crimes against humanity. Mr. Alderman may have thought it was sufficient to qualify his remarks by his words 'so far as pertinent to the present discussion'.<sup>6</sup>

It is remarkable that it does not appear from the transcript that defence counsel, before the accused were called upon to plead, moved that the indictment be amended in order to rectify the erroneous assertion of jurisdiction so far as conspiracy in relation to war crimes and crimes against humanity was concerned. It is usual, at least in a British court, that such a motion is moved as soon as practicable, and, if defence counsel do not do so, it is the duty of a trial judge to raise the matter for argument. This was not done. A probable reason is that German counsel were not familiar with the concept of criminal conspiracy as applied in British and American courts. The Tribunal failed in its duty to intervene.

On a number of occasions, defence counsel adverted to the evidentiary consequences of the conspiracy charge, but did not take the necessary formal steps to challenge the legal validity of Count 1 in the context of the whole indictment. Examples of this lack of legal acumen are:

1. Professor Dr. Kraus, associate counsel for the defendant Schacht, in a submission on behalf of all defence counsel, but without any formal, application, said:<sup>7</sup>

All the defendants are accused of participation in a conspiracy. That is apparently intended to mean that every act brought up in the course of this Trial, no matter by whom it was committed and to whom it was done, is charged against every one of these defendants and that he can be convicted on every one of these acts. Even though the individual defense counsel finds certain fields with which he must concern himself particularly, there are, nevertheless, no fields at all which he can entirely ignore.

2. The lack of precision in Count 1 of the indictment resulting from the use of the words 'during a period of years preceding 8th May 1945' was the subject of submissions by Dr. Horn, counsel for the accused von Ribbentrop, but again there was no formal application for further and better particulars. Dr. Horn said:<sup>8</sup>

... in my presentation of defense against the charges lodged in [the] special plea for the Prosecution, I have offered rebutting evidence in answer to these charges. I have, however, not only to confine myself to refuting those charges ... but I have ... to consider all these charges under the point of view of conspiracy, as according to the submission of the Prosecution, the Defendant Ribbentrop is party to this conspiracy and the question cannot be avoided: When did the conspiracy start?

3. The transcript of the trial<sup>9</sup> illustrates the confusion which the conspiracy count caused in the defence of the accused Schacht. His leading counsel, Dr. Dix, sought elucidation of the question of whether or not Schacht was accused of crimes against humanity, 'that is, not only the crime of conspiracy concerning the war of aggression, but also the typical crimes against humanity, for on this point the individual passages, both of the Indictment and of the Prosecution speech in which the charges were presented, are at variance.' In the legal argument that followed that submission, the American prosecution said that Schacht 'is answerable for every offense committed by any of the defendants up to the time when he openly broke with this outfit with which he became associated.'<sup>10</sup> Dr. Dix did not press the point or make any formal submission. In its judgment the Tribunal said: 'Schacht is indicted under Counts One and Two of the Indictment.'

At all times from the signature of the London Agreement and Charter until the delivery of the judgment of the Tribunal, alleged conspiracy was at the heart of the case against all defendants. Professor Smith has given an intriguing account of the unfolding of the conspiracy charge and of the Tribunal's tribulation in respect of it.<sup>11</sup>

The judgment of the Tribunal on the issue of conspiracy is significant not for what it contained but for what it did not address. The fact that, in a judgment of 131 pages, only two were devoted to a section headed 'The Law as to the Common Plan or Conspiracy' was probably due to the desire of the Tribunal to minimise the importance of a fundamental feature of the trial. The crucial statements in the judgment involving legal principles relating to conspiracy were (pp. 42-44):

Planning and preparation are essential to the making of war. In the opinion of the Tribunal aggressive war is a crime under international law. The Charter defines this offence as planning, preparation, initiation or waging of a war of aggression 'or participation in a common plan or conspiracy for the accomplishment ... of the foregoing'. The Indictment follows this distinction. Count One charges the common plan or conspiracy. Count Two charges the planning and waging of war. The same evidence has been introduced to support both Counts. We shall therefore discuss both Counts together, as they are in substance the same. The defendants have been charged under both Counts, and their guilt under each Count must be determined.<sup>12</sup> (emphasis added)

The 'common plan or conspiracy' charged in the Indictment covers twenty-five years, from the formation of the Nazi party in 1919 to the end of the war in 1945. ...

The Prosecution says, in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal. Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the twenty-five points of the Nazi Party, announced in 1920, or the political affirmations expressed in 'Mein Kampf' in later years. The Tribunal must examine whether a concrete plan to wage war existed, and determine the participants in that concrete plan.

Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides:

'Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan'.

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The

Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war.

The Tribunal confined its judgment on Count 1 to 'only the common plan to prepare, initiate and wage aggressive war'. The judgment did not, according to the expressed reasons, take into account conspiracy for 'the accomplishment of ... a war in violation of international treaties, agreements or assurances' (Article 6 (a) of the Charter), although such charge was included in the indictment (III. Statement of the Offense, lines 10 and 11).

The judgment declared that 'It [the conspiracy] must not be too far removed from the time of decision and action', (p. 43 of the Judgment), but it did not state the periods of time which the Tribunal took into account in reaching a verdict of guilty in relation to eight of the defendants, either in its general pronouncements (pp. 42-44 of the Judgment) or in the reasons given individually for the conclusions as to the eight defendants who were convicted under Count 1. On the contrary, in many cases such reasons detailed activities of the defendants over a period of many years prior to September 1939. In the case of von Neurath, the recital of his conduct under the heading 'Crimes Against Peace' began with his activities in 1933 as Minister of Foreign Affairs; in the case of Goering, the recital began in 1922. It may be argued, however, that those recitals were in the nature of a preamble or a statement of surrounding circumstances.

Moreover, the omission to clarify the relevant period in each case which the Tribunal took into account may appear trivial. Nonetheless, having regard to the fact that fourteen of the defendants were found not guilty under Count 1, the indictment is open to the criticism, often made in the context of criminal conspiracy charges (especially when a number of alleged conspirators are indicted together), that the evidence is not weighed with sufficient precision in so far as each individual charged is concerned. It does not appear from the judgment that, in fact, the Tribunal was punctilious to determine in each case the relevant period so that it could apply its own precept that 'it [the conspiracy] must not be too far removed from the time of decision and of action'.

Apparently the Tribunal did not see fit to apply established practice With respect to the joinder in one Count of charges of conspiracy and charges of the commission of related substantive crimes. At common law, conspiracy was an indictable offence, consisting in the agreement of two or more persons to do an unlawful act, or to do a lawful act by unlawful means. The principles relating to joinder of alleged conspiracy with other charge, are well established.<sup>12a</sup>

The argument is advanced that the pleading, advocacy and judgment in relation to the allegation of conspiracy were, as a matter of established law, unsatisfactory. They would not have been countenanced in a British or Australian, or, it is suggested, American court. A judgment based on such a proceeding would have been appealable. At Nuremberg, however, Article 26 of the Charter provided that the judgment of the Tribunal as to the guilt or the innocence of any Defendant should be final and not subject to review (cf. the provisions of Control Council Law No. 10, upon which the 'Subsequent Proceedings' at Nuremberg were based, and whereby review proceedings, at times invoked successfully, were available).

It is not asserted in this study that the deficiencies to which attention has been directed necessarily affected the ultimate result so far as any individual defendant was concerned, but the matter must remain speculative. If the allegation of conspiracy had been treated by all involved in a manner consistent with established principles, and if defence counsel had sought, and been furnished with, particulars of the persons with whom the defendants were alleged to have conspired, with dates and other relevant details, it is equally speculative whether or not the ultimate result in all cases would necessarily have been the same.

One question remains, although an answer to it has never been suggested or is likely to be forthcoming. Article 16 of the Charter contained provisions designed to ensure 'a fair trial for the defendants'. The outstanding question is: If, as the Tribunal stated in its Judgment, both Counts 1 and 2 were in substance the same, on what evidentiary basis were Frick, Funk, Seyss-Inquart and Doenitz acquitted under Count 1 but convicted on Count 2?

Perhaps the difficulty in furnishing an answer to the question is to be seen in the following paragraph of the individual judgment in the case of Frick, who was acquitted on Count 1 but convicted on Counts 2, 3 and 4 and sentenced to death:



Before the date of the Austrian aggression, Frick was concerned only with domestic administration within the Reich. The evidence does not show that he participated in any of the conferences at which Hitler outlined his aggressive intentions. Consequently the Tribunal takes the view that Frick was not a member of the common plan or conspiracy to wage aggressive war as defined in this Judgment.

The other five paragraphs of the judgment against Frick under the heading of 'Crimes against Peace' were confined to his administrative activities after the seizure of Austria. Those activities were adjudged sufficient to justify his conviction under Count 2.<sup>13</sup>

In the 'Subsequent Proceedings' at Nuremberg, the judges in some cases applied established practice with regard to the joinder of conspiracy with related substantive charges.<sup>14</sup>

## COUNT 2-CRIMES AGAINST PEACE

Article 6 of the Charter conferred jurisdiction on the Tribunal in the following terms:

... to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organisations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) Crimes against peace: namely planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances.....

Count 2 was based on that part of Article 6. The statement of the offense was:

All the defendants with divers other persons, during a period of years preceding 8th May, 1945, participated in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances.

The particulars under the Count were:

(A) The wars referred to in the Statement of Offense in this Count Two of the Indictment and the dates of their initiation were the following: against Poland, 1st September, 1939; against the United Kingdom and France, 3rd September, 1939; against Denmark and Norway, 9th April, 1940; against Belgium, the Netherlands and Luxembourg, 10th May, 1940; against Yugoslavia and Greece, 6th April, 1941; against the U.S.S.R., 22nd June, 1941; and against the United States of America, 11th December, 1941.

(B) Reference is hereby made to Count One of the Indictment for the allegations charging that these wars were wars of aggression on the part of the defendants.

(C) Reference is hereby made to Appendix C annexed to this Indictment for a statement of particulars of the charges of violations of international treaties, agreements and assurances caused by the defendants in the course of planning, preparing and initiating these wars.

The charge in Count 2 was of actual participation in the acts of planning, preparation, initiation and waging of wars of aggression 'which were also wars in violation of international treaties, agreements and assurances'. Of the twenty two accused, sixteen were charged under Count 2 and twelve convicted. Of the six not charged, four were convicted under another Count or other Counts and sentenced to death, one was convicted on another Count and sentenced to imprisonment for twenty years and one was totally acquitted.

Count 2 was clear-cut and simply phrased. It was the only Count which did not expressly involve the concept of a common plan or conspiracy. The German seizure of Austria and its acquisition of the major part of Czechoslovakia were not included as 'wars of aggression'.

No criticism can be levelled at the actual pleading in Count 2, having regard to the provisions of the Charter. Of the twelve defendants convicted under Count 2, seven were, in the ultimate result, sentenced to death and five to terms of imprisonment varying from ten years to life.

The justification for the charge of crimes against peace is considered in Chapter 18.

### COUNT 3--WAR CRIMES

The aim of those responsible for the drafting and approval of the London Agreement and Charter to make the formulation and execution of a common plan or conspiracy the cornerstone of the whole indictment is illustrated by the terms of Count 3, which provided:

All the defendants committed War Crimes between 1st September, 1939, and 8th May, 1945, in Germany and in all those countries and territories occupied by the German armed forces since 1st September, 1939, and in Austria, Czechoslovakia, and Italy, and on the High Seas.

All the defendants, acting in concert with others formulated and executed a common plan or conspiracy to commit War Crimes as defined in Article 6 (b) of the Charter. This plan involved, among other things, the practice of 'total war', including methods of combat and of military occupation in direct conflict with the laws and customs of war, and the commission of crimes perpetrated on the field of battle during encounters with enemy armies, and against prisoners of war, and in occupied territories against the civilian population of such territories.

The said War Crimes were committed by the defendants and by other persons for whose acts the defendants are responsible (under Article 6 of the Charter) as such other persons when committing the said War Crimes performed their acts in execution of a common plan and conspiracy to commit the said War Crimes, in the formulation and execution of which plan and conspiracy all the defendants participated as leaders, organisers, instigators and accomplices.

These methods and crimes constituted violations of international conventions, of internal penal laws and of the general principles of criminal law as derived from the criminal law of all civilised nations, and were involved in and part of a systematic course of conduct.

There followed seventeen pages of particulars, pleaded with great detail.

Only four of the Nuremberg defendants were not charged under Count 3 - Streicher, von Shirach, Schacht and von Papen; of those so charged, only Hess and Fritzche were found not guilty.

Count 3 was expressed to be based 'especially' on paragraph 6 (b) of the Charter. It embraced two classes of crimes: first, specific war crimes, in the strict sense, and, second, conspiracy to commit war crimes 'as defined in Article 6 (b) of the Charter'. Appendix A of the indictment was introduced by the following sentence:

The statements hereinafter set forth following the name of each individual defendant constitute matters

upon which the prosecution will rely inter alia as establishing the individual responsibility of the defendant.

The reference to 'individual responsibility' appears to be in furtherance of the third paragraph in the statement of the offence under Count 3.

In the cases of all eighteen defendants charged under Count 3, with qualifications in the cases of Raeder, Doenitz and Fritzsche, the particulars in Appendix A contained the words '..... and he authorised, directed and participated in the War Crimes set forth in Count Three of the Indictment ...' In some instances there was very brief, general expansion of those words, which were in conformity with the first paragraph of Count 3. However, the particulars in Appendix A did not express any overt acts by any defendant upon which the prosecution relied in respect of the second and third paragraphs of Count 3.

The significant sequel is that the judgment of the Tribunal, both in its general treatment of 'The Law Relating to War Crimes and Crimes against Humanity' (pp. 64-65) and in the findings of fact in respect of all of the defendants convicted under Count 3 (pp. 84-130), did not purport to make any finding of guilt of conspiracy as charged under the second and third paragraphs of Count 3 of the indictment. The guilt of the sixteen defendants convicted on Count 3 rested solely on the actual commission of, or involvement in, 'war crimes' as defined in Article 6 (b) of the Charter.

The Judgment of the Tribunal simply stated, without elaboration (p. 64):

As heretofore stated, the Charter does not define as a separate crime any conspiracy except the one set out in Article 6 (a) dealing with crimes against peace.

There were a number of flaws in Count 3, as a matter of law:

First, because conspiracy was charged under the second and third paragraphs of Count 3, evidence was admissible on a vast range of allegations involving war crimes. As stated, no particulars of individual overt acts were given. The seventeen pages of particulars contained only three names, all senior military officers. Many hundreds of types of crimes were specified, involving several million persons. None of the eighteen accused were mentioned. In the particulars, the expressions 'the Germans', 'the defendants' and 'the Nazi conspirators' were used without specificity. The lack of specific allegations, as a matter of pleading, was not, for the reason already stated, cured by the inclusion in the indictment of the reference to Appendix A. In some instances, there was brief, general expansion of the cited words. The Tribunal met the obvious legal problem by confining its findings against individuals to such parts of the particulars and evidence as it determined implicated the accused individually in the actual commission of war crimes.

Second the inclusion of conspiracy charges in Count was not authorised by Article 6 of the Charter, which, as far as the jurisdiction of the Tribunal was concerned, confined alleged conspiracy to the 'accomplishment' of crimes against peace.

Third, irrespective of the constraint imposed by Article 6, it was arguable, had it been necessary, that Count 3 was bad for duplicity. The first paragraph charged the commission of war crimes. The charges of conspiracy in the second and third paragraphs of the same Count were based on the same particulars as those under the first paragraph.

The question of duplicity has been previously considered (footnotes 12 and 12a to this Chapter) in relation to Count 1. On this issue, Gillies, The Law of Criminal Conspiracy, after considering a number of English and Australian cases, concludes (p. 189):

... the defendant should in general be on strong grounds in applying to the court for an order that the prosecution elect as to which of the Counts it wishes to proceed with, i.e. that relating to conspiracy or those relating to the substantive offences.

In the case of the Nuremberg indictment, it is submitted that the argument is a fortiori, since the 'rolled up' pleading in Count 3 was embraced within the same Count and the prosecution relied upon the same particulars.

Fourth, in including in the third paragraph of the statement of offence under Count 3 the reference to 'leaders, organisers, instigators and accomplices' the prosecution misconceived the limited application of the last paragraph of Article 6 of the Charter. As the tribunal stated in its Judgment (p. 44):

In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan.

Since jurisdiction in relation to conspiracy was confined by Article 6 to crimes against peace, as the Tribunal determined, the attempt to rely on the last paragraph of Article 6 in the case of war crimes under Count 3 was wrong in law.

#### COUNT 4-CRIMES AGAINST HUMANITY

The substantive provisions of Count 4 were:-

All the defendants committed Crimes against Humanity during a period of years preceding 8th May, 1945 in Germany and in all those countries and territories occupied by the German armed forces since 1st September, 1939 and in Austria and Czechoslovakia and in Italy and on the High Seas.

All the defendants, acting in concert with others, formulated and executed a common plan or conspiracy to commit Crimes against Humanity as defined in Article 6 (c) of the Charter. This plan involved, among other things, the murder and persecution of all who were or who were suspected of being hostile to the Nazi Party and all who were or who were suspected of being opposed to the common plan alleged in Count One.

The said Crimes against Humanity were committed by the defendants and by other persons for whose acts the defendants are responsible (under Article 6 of the Charter) as such other persons, when committing the said War Crimes, performed their acts in execution of a common plan and conspiracy to commit the said War Crimes, in the formulation and execution of which plan and conspiracy all the defendants participated as leaders, organisers, instigators and accomplices (emphasis added to show the confusion in drafting).

These methods and crimes constituted violations of international conventions, of internal penal laws, of the general principles of criminal law as derived from the criminal law of all civilised nations and were involved in and part of a systematic course of conduct. The said acts were contrary to Article 6 or the Charter.

The prosecution will rely upon the facts pleaded under Count Three as also constituting Crimes against Humanity.

Count 4 was purportedly 'especially' based on Article 6 (c) of the Charter, but the concluding paragraph of Article 6 also was involved. It is apparent that Count 4 was designed to charge three categories of crimes:-

'Crimes against Humanity' (as defined in the Charter);

Conspiracy to commit such crimes (the last paragraph of Article 6 of the Charter);

and

Both the commission of, and conspiracy to commit, war crimes, the particulars of which, as stated in Count 3, were, by reference, embodied in Count 4 (see the last paragraph of the substantive provisions of Count 4 cited above).

Thus, in short, Count 4 embraced the following types of crimes; the actual commission of both war crimes and crimes against humanity; and conspiracy to commit crimes in each of those categories.

In the third paragraph of the substantive provisions of Count 4, the expression 'the said War Crimes' is used twice. As a matter of drafting, such use can only be a reference to the whole of Count 3 and the particulars thereunder. Any restriction of this wide ambit was dependent on the particulars in Appendix A of the indictment in relation to the alleged individual responsibility of defendants.

Of the twenty two defendants tried at Nuremberg, only four--Raeder, Doenitz, Schacht and von Papen--were not indicted under Count 4. However, of these four both Raeder and Doenitz were charged under Counts 1, 2 and 3.

In the cases of Raeder and Doenitz, it is difficult, having regard to the indictment to appreciate the logic of the decision of the prosecution that each should be charged only under Count 3 and not also under Count 4, because the indictment, in effect, combined the charges under Count 3 with those under Count 4. In fact, Raeder was convicted under Counts 1, 2, and 3; Doenitz was found not guilty under Count 1, but guilty under Counts 2 and 3.

The Tribunal found that Raeder participated in the planning and waging of aggressive war (Count 2) and the actual commission of war crimes (Count 3). He was also convicted under Count 1. These findings followed the particulars in the indictment, which alleged, inter alia, that Raeder 'authorised, directed and participated in the war crimes set forth in Count Three of the Indictment, including particularly war crimes arising out of sea warfare'.

In the case of Doenitz, the Tribunal found that 'the evidence does not show that he was privy to the conspiracy to wage aggressive wars or that he prepared and initiated such wars'. Count 1. In respect of Count 2, however, the finding was that he was 'active in waging aggressive war'. Under Count 3, in accordance with which he was charged with having 'authorised, directed and participated in the War Crimes set forth in Count 3 of the Indictment, including particularly the crimes against persons and property on the high seas', he also was found guilty.

Count 4 posed legal problems of substance. As in the case of Count 3, it can be criticised as containing several flaws.

First, the concept of conspiracy was again introduced into a Count in which related substantive crimes also were charged. Second, there was no authority under Article 6 of the Charter to invoke its provisions in relation to allegations of conspiracy to commit crimes against humanity, because conspiracy charges were confined by Article 6 (a) to crimes against peace. Third, the use twice of the words 'the said War Crimes' in the third paragraph of the 'statement of the offence' was either simply an error or, if not, the result of misconception. Fourth, as in the case of Count 3, reliance on the last paragraph of Article 6, was, as pleaded, not legally valid. Fifth, as stated, by virtue of the fifth paragraph in the 'statement of the offence' all the facts pleaded under Count 3 were again relied upon as constituting crimes against humanity under Count 4, with obvious resultant duplication.

The basis for the criticism has been stated above in relation to Count 3.

It does not appear from the transcript that defence counsel attacked the legal defects to which attention has been directed.

So far as is relevant, the Tribunal merely stated in its Judgment (p. 65):

... from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.

In an earlier section of its Judgment, in which the Tribunal analysed 'The Law of the Charter', it did not expressly refer to crimes against humanity. It adopted the law of the Charter as decisive and binding upon it.

Criticism is not directed at the inclusion of sub-paragraph (c) of Article 6. It was proper that jurisdiction in respect of crimes against humanity should have been conferred on the Tribunal, but, in the circumstances, it was not incumbent on the prosecution to invoke that jurisdiction.<sup>15</sup>

It is therefore argued that the asserted defects in relation to Count 4 were not addressed by the Tribunal. Count 4, as it was pleaded, has the appearance of a concluding and separate 'catch all' charge, embodying allegations of conspiracy, war crimes and crimes against humanity, without regard to duplication.

## CONCLUSIONS

Before stating the conclusions to which the analysis of the indictment leads, it is convenient to refer to one general question which is relevant to the legal issues concerning the indictment: that is, the general substantive and procedural rules to which, independently of the provisions of the Agreement and Charter, the trial was, if necessary, subject.

In relevant literature—and in the course of the trial—frequent references may be found to 'Anglo-American' legal systems, including principles relating to the law of criminal conspiracy.<sup>16</sup> The Nuremberg Tribunal was not obliged to pay regard to any particular national concepts relating to either substantive or procedural law. The Agreement and Charter prescribed both the substantive law and rules for the conduct of the trial. It was an international tribunal, with members from four different nations. All the accused were nationals of a fifth country. It was not appropriate for the Tribunal to adopt a predilection for any one national legal system; nor did it do so. Insofar as the Charter left some matters to the determination of the Tribunal, it did not attempt to prescribe the manner of exercise by the Tribunal of its discretion by referring to any national system of law.

Article 16 of the Charter prescribed evidential and procedural rules 'to ensure fair trial for the defendants'. The rules were those applicable, with some variations, in the legal systems of civilised countries, whereby it is basic that the trial must be fair, not only in relation to the facts but: also to the law.

The essential question is whether, if the foregoing criticism of Counts 1, 3 and 4 of the indictment is valid, the accused had a fair trial.

In an article first published in 1947,<sup>17</sup> Professor Quincy Wright surveyed the 'Law of the Nuremberg Trial' but was not critical of the indictment.<sup>18</sup> Indeed there is scant published analysis of the four Counts in the strictly legal sense. Yet critical, detailed examination of any indictment, especially one so lengthy and factually comprehensive as that at Nuremberg, is the primary duty of defence counsel, and, in default, of the trial judge.

It is evident that the American prosecutors were determined that the trial should be all-embracing. It seems not unlikely that, to the extent to which the indictment was objectionable, the reason was the American preference for excessive length and breadth of the indictment.

The conclusion is advanced that two and not four Counts would have been appropriate: that is, only crimes against peace and war crimes.

As was stated by the Tribunal in the High Command Case in the 'Subsequent Proceedings', the inclusion in the indictment of the conspiracy allegation did not advance the case for the prosecution, and the Count was struck

out.<sup>19</sup>

No argument can be advanced against the confining of the Counts in the indictment to crimes against peace and war crimes on the basis that thereby relevant evidence would not have been admissible. Further, an examination of the individual judgments indicates that the ultimate results of the trials would not have been different, including the punishment of those found guilty, with one possible exception--the case of von Shirach. He was charged under Counts 1 and 4, acquitted on Count 1, convicted under Count 4 and sentenced to imprisonment for twenty years. The Tribunal found as to von Shirach that '... while he did not originate the policy of deporting Jews from Vienna [he] participated in this policy after he had become Gauleiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the Ghettoes of the East. Bulletins describing the Jewish extermination were in his office.' There is no reason why his guilt under Count 4 could not have been established under Count 3, especially as the definition of 'war crimes' in Article 6 (b) of the Charter was expressed not to be exhaustive.

The fact that the Charter conferred jurisdiction on the Tribunal in respect of crimes against humanity was no reason why there should have been in the indictment a separate Count relating specifically to crimes against humanity. If it had been thought appropriate to include in the indictment the concept of crimes against humanity, there could have been a combination, in one Count, of war crimes and crimes against humanity, in accordance with the definitions in Article 6 (b) and 6 (c) of the Charter.

The omission of Counts 1 and 4 would, it is argued, have had the following beneficial results (not only in the principal trial but also in the 'Subsequent Proceedings'):

The prolixity of the indictment would have been considerably reduced.

The time occupied by the trial would have been much less.

The scope for argument, in relation both to the admissibility of evidence and legal issues, especially in respect of conspiracy, would have been much narrower.

The legal integrity of the indictment must have been enhanced because it would have been inherently more cohesive and not overweighted.

The Tribunal's burdensome task would have been alleviated to a substantial degree.

There would have been much less public criticism of the trial at the time and subsequently.

For the future, there would have been the opportunity to appraise more objectively, so far as the prosecution was concerned, a trial which the President described in an opening statement on the first day as one which is 'unique in the history of the jurisprudence of the world and is of supreme importance to millions of people all over the globe'.

The divergence of published views in relation to the conspiracy count, sparse though they are, is illustrated by Brigadier General Taylor:

It became apparent during the I.M.T. trial, not only from the arguments of defense counsel but from the reactions of the Continental members of the Tribunal, that many European jurists view the Anglo-Saxon concept of criminal conspiracy with deep suspicion. Indeed, after the close of the I.M.T. proceedings the French member of the Tribunal (Professor Donnedieu de Vabres) delivered a public lecture in which he uttered some very harsh words about conspiracy and made it plain that he, for one, had endeavoured at Nuremberg to confine that doctrine to the narrowest limits. It is an interesting contrast that Mr. Henry L. Stimson, in one of the most distinguished pieces of writing on the Nuremberg trials, declared that in his opinion the principal defect in the I.M.T.'s judgment was the

very limited scope which had been allowed to the doctrine of conspiracy.<sup>20</sup>

As Mr. Alderman, American Associate Trial Counsel, said in presenting the detail relating to aggressive war and conspiracy: '... the aggressive war phase of the entire case is really, we think, the heart of the case ... everything else in this case, however dramatic, however sordid, however shocking and revolting to the common instincts of civilised people, is incidental to, or subordinate to, the aggressive war aspect of the case'.<sup>21</sup>

Even among prosecution counsel there was confusion and misunderstanding in relation to the conspiracy Count. For example, Captain Sprecher, American Assistant Trial Counsel, in presenting the case on the individual responsibility of the defendant Fritzsche 'for Crimes against Peace, War Crimes and Crimes against Humanity as they relate directly to the Common Plan or Conspiracy', said:<sup>22</sup>

It is planned to make this presentation in three principal divisions:

First, a short listing of the various positions held by the Defendant Fritzsche in the Nazi State.

Second, a discussion of Fritzsche's conspiratorial activities within the Propaganda Ministry from 1933 through the attack on the Soviet Union.

Third, a discussion of Fritzsche's connection, as a Nazi propagandist, to the atrocities and the ruthless occupation policy which formed a part of the Common Plan or Conspiracy.

Counsel was, according to the transcript, in error in asserting that Fritzsche was charged with crimes against peace (Count 2). He was indicted on Counts 1, 3 and 4<sup>23</sup> and acquitted of all charges. However, the principal criticism of the cited passage from the presentation of prosecution counsel is that it illustrates the confused thinking in relation to the crime of conspiracy when charged in conjunction with substantive crimes (Counts 3 and 4) alleged to have been the purpose of the conspiracy.

Nuremberg law would have been the richer and more enduring if the indictment had concentrated on the two essential elements, crimes against peace and war crimes, and if the particulars had been curtailed by omitting substantial parts, especially the cumulative allegations, or, alternatively, aggregating much of the detail and leaving it to defence counsel, if they wished, to require further and better particulars. It is unlikely that the defence would have made such a request, as the alleged facts were seldom disputed.

In the light of the foregoing analysis, the ultimate conclusion concerning the indictment is that legally it was not as appropriate as it should have been. It is regrettable that the disputation concerning Nuremberg has not been focussed more closely on the most basic of all the relevant instruments--the indictment.



## NOTES

1. His Majesty's Stationery Office, London, 1945, Cmd. 6696.
  - 1a. Nuremberg Trial, I.M.T., Vol. VII, p. 521.
  2. Smith, Reaching Judgment at Nuremberg, Basic Books, Inc., New York, 1977, p. 49.
  3. Ibid., pp. 46-73.
  4. Ibid. p. 72.
  5. Nuremberg Trial, I.M.T., vol. II, p. 178.
  6. Nuremberg Trial, I.M.T., vol. II, p. 245.
  7. Nuremberg Trial, I.M.T., vol. VII, p. 517.
  8. Nuremberg Trial, I.M.T., vol. VIII, p. 223.
  9. Nuremberg Trial, I.M.T., vol. XII, pp. 446-448.
  10. Ibid., p. 448.
  11. Smith, op. cit., pp. 114-142.
  12. See Archbold, Criminal Pleading, Evidence and Practice, 41st edn., p. 2035 *et seq.* The offence of conspiracy at common law was abolished by s. 5(1) of the Criminal Law Act 1977 (U.K.), except in certain respects. Many of the principles developed in relation to conspiracy at common law are material in applying the provisions of the 1977 Act (Archbold, op. cit., p. 2035). Common law practice is reflected in the English provision in a Practice Direction of 9 May 1977 ((1977) 2 All E.R. 540) in these terms: 'In any case where an indictment contains substantive Counts and a related conspiracy Count, the judge should require the prosecution to justify the joinder, or, failing justification, to elect whether to proceed on the substantive or on the conspiracy Counts.' The Tribunal, in its Judgment, obviated the need to consider settled principles of English law in relation to the indictment by simply stating '... We shall therefore discuss both Counts together, as they are in substance the same'. See also Halsbury's Laws of England, 4th edn., vol. 11, p. 48: 'A single Count which charges what are distinct though overlapping conspiracies is bad for duplicity', and the cases there cited.
- A comprehensive comparative survey of the law relating to conspiracy in most countries is contained in a report by Professor Jescheck, President of the International Association of Penal Law, to the 12th International Congress on Comparative Law at Sydney and Melbourne in August 1986, pp. 29 *et seq.* The report illustrates, the wide divergences between national laws. The Tribunal did not state in its Judgment what criteria it applied in any of its findings relating to conspiracy.
- 12a. See Watson and Purnell, Criminal Law in New South Wales, vol. 1, paras. 1047 and 1133 ('Conspiracy ought not to be charged when a substantive offence has been committed and it is possible to indict for such offence'). In R. v. Hoar, (1981) 56 A.L.J.R., 43 at p. 46, it was stated in the leading judgment of four of the Justices of the High Court: '... It is undesirable that conspiracy should be charged when a substantive offence has been committed and there is a sufficient and effective charge that this offence has been committed. As Lord Pearson observed in Verrier (at pp. 223-224) the addition of a charge of conspiracy in the same indictment "will tend to prolong and complicate the trial". Murphy J. expressed similar views in strong language and referred to the 'amorphous' nature of conspiracy, which he described as a 'slippery concept'. In Gerakiteys v. R. (1984) 58 A.L.J.R. 182, Murphy J. repeated the criticism in R. v. Hoar of what he termed 'excessive reliance on conspiracy charges' and said: 'Too often, those

prosecuting appear to adopt the view that an accused person must be guilty of something but rather than identifying what that something is, choose a conspiracy charge as a dragnet'.

13. For critical comment on the conviction of Frick on Count 2, see Pompe, Aggressive War an International Crime, Martinus Nijhoff, the Hague, 1953, p. 220 and p. 306.
14. See the cases discussed in Chapter 13 of this study, especially the 'High Command Case' and the 'Justice Case'.
15. The significance of the inclusion in the Charter of crimes against humanity is emphasised in Lauterpacht, International Law, Collected Papers, ed. E. Lauterpacht, Cambridge, 1970, p. 143: 'The inclusion of crimes against humanity in an international instrument reflected the acknowledgment of fundamental human rights of the individual recognised by international law and grounded in considerations superior to the law of the State. To that extent ... the instrument in question recognised the individual as a subject of a fundamental international right.' And see *ibid.*, p. 471: '... the Charter ... and the Judgment ... proclaimed the criminality of offences against humanity, i.e. of such offences against the fundamental rights of man to life and liberty, even if committed in obedience to the law of the State. To that extent ... positive law has recognised the individual as endowed, under international law, with rights the violation of which is a criminal act. The repeated provisions of the Charter of the United Nations in the matter of human rights and fundamental freedoms are directly relevant in this connection.' Professor Lauterpacht had previously described the inclusion of crimes against humanity in Article 6 (c) of the Charter as an 'acknowledgment of fundamental rights of the individual recognised by international law' ((1948) 64 L.Q.R. 97, at p. 104). He added: 'It is possible that this result did not occur to the authors of the Charter nor, perhaps, to the tribunal which applied it. Yet, unless the Charter is conceived as an *ad hoc* piece of vindictive legislation enacted by the victor against the vanquished, this is its inevitable and logical result. In terms of law, to the conception of crimes against humanity there must correspond the notion of fundamental human rights recognised by international law and, as a further result, of an international status of the individual whose rights have thus been recognised'. Further, for a detailed discussion of crimes against humanity, see Schwelb, (1946) 23 B.Y.I.L. pp. 176-226.
16. For example, Nuremberg Trial, Opening Address for the Prosecution (by Alderman), I.M.T., vol. II, p. 244.
17. See (1947) 41 A.J.I.L., p. 38, reproduced in International Criminal Law, edited by Mueller and Wise, 1965, (Comparative Criminal Law Project), New York University, School of Law.
18. See also the discussion of the conspiracy component of the indictment by Brigadier General Taylor in Nuremberg Trials, War Crimes and International Law, International Conciliation, Carnegie Endowment for International Peace, April 1949, No. 450, New York, pp. 344-347, in which no clear view was expressed on the question of the soundness in law of the indictment.
19. N.M.T., vol. X, *loc. cit.*, *passim*.
20. Taylor, *op. cit.*, p. 345. The comment of Mr. Stimson cited therein is from The Nuremberg Trial: Landmark in Law, Foreign Affairs, vol. 25, No. 2 (January 1947), pp. 179 *et seq.*
21. Nuremberg Trial, I.M.T., vol. II, pp. 241-242.
22. Nuremberg Trial, I.M.T., vol. VI, p. 53.
23. See Appendix A of the indictment, p. 40 and the I.M.T. judgment, p. 127.

## CHAPTER 9 THE INDICTED ORGANISATIONS

It is surprising that there is comparatively little published comment on the inclusion in the London Charter of Articles 9, 10 and 11. They provided for the Tribunal to make declarations that the group or organisation, of which a convicted person was a member, was a criminal organisation, with potential consequences for all the members of the organisation.

The full terms of the three Articles were:

9. At the trial of any individual member of any group or organisation the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organisation of which the individual was a member was a criminal organisation.

After receipt of the Indictment the Tribunal shall give notice as it thinks fit that the prosecution intends to ask the Tribunal to make such declaration and any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation. The Tribunal shall have power to allow or reject the application. If the application is allowed, the Tribunal may direct in what manner the applicants shall be represented and heard.

10. In cases where a group or organisation is declared criminal by the Tribunal the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national military or occupation courts. In any such case the criminal nature of the group or organisation is considered proved and shall not be questioned.
11. Any person convicted by the Tribunal may be charged before a national military or occupation court referred to in Article 10 of this Charter with a crime other than of membership in a criminal group or organisation and such court may after convicting him impose upon him punishment independent of and additional to the punishment imposed by the Tribunal for participation in the criminal activities of such group or organisation.

It is noteworthy that the London Agreement did not itself refer to the declaration of a group or organization as criminal.<sup>1</sup> Nevertheless, the Tribunal was required to construe the Agreement and Charter as one document, irrespective of the soundness of the legal basis for the provisions relating to criminal organizations.

In analysing the indictment, it is necessary to consider the manner in which the question of the criminal character of the named groups or organizations was woven into its whole fabric. The structure of the indictment was not only novel but also extremely ingenious. Sub-paragraph (H) of paragraph IV under Count 1 of the indictment, with the heading 'Individual Group and Organization Responsibility for the Offense Stated in Count One' ('the common plan or conspiracy') was as follows:-

... Reference is hereby made to Appendix B of this Indictment for a statement of the responsibility of the groups and organizations named herein as criminal groups and organizations for the offense set forth in this Count One of the Indictment.

Similar phraseology was used in paragraph VII under Count 2, in paragraph IX under Count 3 and in paragraph XI under Count 4.

The manner of pleading was such that the indictment brought together, and forged into one (a) the specific charges against the individual defendants (b) the common plan or conspiracy, and (c) the allegations of the criminality of the named groups and organizations. The link was patent, obviously deliberate and, from the viewpoint of evidence, devastating in its effect.

The Nuremberg trials were in practical terms one conglomerate trial of Nazi Germany as an entity, of its leaders and of hundreds of thousands of members of the named groups or organizations. The acts charged covered varying periods--in the cases of the Reich Cabinet and the Gestapo the period commencing with the appointment of Hitler as Chancellor of the German Republic on 30 January 1933 and ending with the surrender of Germany on 8 May 1945; in some cases (for example, Goering, Rosenberg, Streicher and von Shirach), acts done and

statements made before 30 January 1933 were the subject of evidence; in other cases the relevant period was not specified.

Because of the link between all four Counts and all of the allegations against the named groups and organisations, evidence was admissible over a vast range of activities within the German Government and the armed forces over a very long period. Such evidence was admissible if the Tribunal deemed it 'to have probative value' (Article 19 of the Charter). In truth, it was the third Reich which was on trial.

A clear acknowledgment of the novelty of the jurisdictional authority conferred by Articles 9, 10 and 11 of the Charter, and, pursuant to them, of the terms of the indictment relating to the groups or organisations which it was alleged should be declared criminal, was made in the opening address of Mr. Justice Jackson, when he said:<sup>2</sup>

The unconditional surrender of Germany created for the victors novel and difficult problems of law and administration. Being the first such surrender of an entire and modernly organised society, precedents and past experiences are of little help in guiding our policy toward the vanquished.

In the order in which they were named in the indictment the organisations were: The Reich Cabinet, The Leadership Corps of the Nazi Party, The SS (including the SD), The Gestapo, The SA, and The General Staff and High Command of the German Armed Forces.

As an example of the vast mass of documentary and other evidence which became admissible by virtue of Articles 9, 10 and 11, the particulars in Appendix B of the indictment concerning the Reich Cabinet were typical.

The Cabinet, it was pleaded, consisted of (a) the persons who were members of the ordinary cabinet after 30 January 1933, meaning the Reich Ministers, i.e., heads of departments of the central government; Reich Ministers without portfolio; State Ministers acting as Reich Ministers; and other officials entitled to take part in meetings of this cabinet; (b) members of the Council of Ministers for the Defence of the Reich; and (c) members of the Secret Cabinet Council.'

The indictment alleged against the Cabinet members:

Under the Fuehrer, these persons functioning in the foregoing capacities and in association as a group, possessed and exercised legislative, executive, administrative and political powers and functions of a very high order in the system of German government. Accordingly, they are charged with responsibility for the policies adopted and put into effect by the government including those which comprehended and involved the commission of the crimes referred to in Counts One, Two, Three and Four of the indictment.

Irrespective of the question of the legality of Articles 9, 10 and 11, the particular criticism is made that the provisions of those Articles were far too expansive. It has been estimated<sup>3</sup> that if all six organisations had been declared criminal about one and a half million persons would have potentially been chargeable for membership of an organisation before 'national, military or occupation courts'. In any such case, 'the criminal nature of the organisation' was to be considered proved and could not be questioned (Article 10). In fact, very few charges were laid under Article 10, and they were mainly in some of the 'Subsequent Proceedings' at Nuremberg.<sup>4</sup>

The consequences of the drafting of the indictment in such wide terms were that many months were spent in argument by counsel, the tendering of evidence and voluminous documents, the consideration thereof by the Tribunal and the production of its eighteen-page judgment on the issue, together with all the associated work. In addition, the Tribunal appointed a Commission (Article 17 (e) of the Charter) to examine the evidence submitted, especially by affidavit, by members of the indicted organisations.<sup>5</sup>

In his closing address, Sir David Maxwell-Fyfe said:<sup>6</sup>

No one can say hereafter that every opportunity has not been afforded them [the groups and organisations] for their defence. An elaborate procedure has been evolved to obtain and place before you their evidence. 102 witnesses have been heard before your Commissioners--witnesses selected by Defense Counsel from the

many thousands of members of the organizations available. You have the transcripts of their evidence. Of these witnesses Defense Counsel have selected 20, who have given evidence in this Court and whom you have seen and heard yourselves. In addition to this oral testimony, you have also had submitted to you the substance of no less than 136,213 affidavits for the SS, 155,000 for the Political Leaders, 2,000 for the Gestapo, 10,000 for the SA and 7,000 for the SD, a total of 310,213. And you have also had presented before your Commissioners another 1,809 affidavits either in substance or in whole, the majority of which are now contained in the transcript of the Commissioners' proceedings.

Perhaps the answer to the question as to why the indictment was drafted in such wide terms is in the concluding sentences of the final address of Colonel Taylor (as he then was) in relation to the criminality of the German General Staff and High Command.<sup>7</sup>

This was not war; it was crime. This was not soldiering; it was savagery. ... We cannot here make history over again, but we can see that it is written true.

The pleading in the indictment concerning the criminality of groups or organisations on such a vast scale was the responsibility not of those who framed the Charter or of the Tribunal, but of those who approved the indictment—that is, the Committee of Chief Prosecutors (Article 14 (c)).

Moreover, the form of the indictment was objectionable in that it charged the six organisations, and, in some cases, the unnamed members thereof, with criminal responsibility for all the crimes set forth in the four counts. This was an excess of pleading. It is true that an individual member of a group or organisation declared criminal would have had to be personally charged in subsequent proceedings and the nature and extent of his association with the organisation proved before he would be punished. However, such proceedings would have begun with an established and irrebuttable determination of the criminal character of the organisation.

Control Council Law Number 10 included among the crimes which it declared 'is recognised as a crime' 'membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal'. The maximum punishment on conviction was the death penalty.

Criticism of the Tribunal's judgment, some of which was identified by Professor Woetzel,<sup>8</sup> was unfounded. Much of the criticism stemmed from one sentence in the Judgment<sup>9</sup>: 'A criminal organisation is analogous to a criminal conspiracy in that the essence of both is cooperation for criminal purposes'. This was a general statement which was, it is submitted, true and apposite in the context. Unfortunately, it has resulted in obfuscation.<sup>10</sup> Professor Woetzel,<sup>11</sup> under the heading 'The Legal Basis for the Judgment on Criminal Organisations', wrote at length on the crime of conspiracy generally.

What some authors appear to have overlooked is that the Tribunal's Judgment relating to organisations emanated from Articles 9, 10 and 11 of the Charter, which prescribed the jurisdiction of the Tribunal. What the Tribunal stated in its Judgment was designed to mitigate the rigour of those Articles. The Tribunal's concern was reflected in an announcement by the President on the 33rd day of the trial.<sup>12</sup>

The Tribunal made declarations of criminality against the Leadership Corps, the SS (including the SD) and the Gestapo. It declined to do so in the cases of the Reich Cabinet, the General Staff and High Command (the Russian member dissenting in each of those cases) and the SA.

The Tribunal recognised the potential scope for injustice when it said in its Judgment:

This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.<sup>13</sup>

The Tribunal proceeded, as a matter of interpretation of its discretionary jurisdiction under Article 9, to include qualifications in its declarations and to make recommendations. The Judgment stated:

Since declarations of criminality which the Tribunal makes will be used by other courts in the trial of persons on account of their membership in the organisations found to be criminal, the Tribunal feels it appropriate to make the following recommendations:

1. That so far as possible throughout the four zones of occupation in Germany the classifications, sanctions and penalties be standardised. Uniformity of treatment so far as practical should be a basic principle. This does not, of course, mean that discretion in sentencing should not be vested in the court; but the discretion should be within fixed limits appropriate to the nature of the crime.
2. Law No. 10, to which reference has already been made, leaves punishment entirely in the discretion of the trial court, even to the extent of inflicting the death penalty. The De-Nazification Law of 5th March, 1946, however, passed for Bavaria, Greater-Hesse and Wuertemberg-Baden, provides definite sentences for punishment in each type of offence. The Tribunal recommends that in no case should punishment imposed under Law No. 10 upon any members of an organisation or group declared by the Tribunal to be criminal exceed the punishment fixed by the De-Nazification Law. No person should be punished under both laws.
3. The Tribunal recommends to the Control Council that Law No. 10 be amended to prescribe limitations on the punishment which may be imposed for membership in a criminal group or organisation so that such punishment shall not exceed the punishment prescribed by the De-Nazification Law.<sup>14</sup>

In each of the three declarations of criminality, the Tribunal, in its conclusion, carefully described the types of persons who could be affected thereby. It therefore justly restricted the scope of its jurisdiction. It also put in proper perspective the essential purpose of Articles 9, 10 and 11 when it stated in its judgment in relation to the 'Reich Cabinet':

The Tribunal is of opinion that no declaration of criminality should be made with respect to the Reich Cabinet for two reasons: (1) because it is not shown that after 1937 it ever really acted as a group or organisation; (2) because the group of persons here charged is so small that members could be conveniently tried in proper cases without resort to a declaration that the Cabinet of which they were members was criminal.

... it is clear that those members of the Reich Cabinet who have been guilty of crimes should be brought to trial; and a number of them are now on trial before the Tribunal. It is estimated that there are 48 members of the group, that eight of these are dead and 17 are now on trial, leaving only 23 at the most, as to whom the declaration could have any importance. Any others who are guilty should also be brought to trial; but nothing would be accomplished to expedite or facilitate their trials by declaring the Reich Cabinet to be a criminal organisation. Where an organisation with a large membership is used for such purposes, a declaration obviates the necessity of inquiring as to its criminal character in the later trial of members who are accused of participating through membership in its criminal purposes and thus saves much time and trouble. There is no such advantage in the case of a small group like the Reich Cabinet.<sup>15</sup>

In the writer's opinion, the only respect in which the Tribunal's Judgment concerning its jurisdiction under Article 9 can be criticised relates to its general observations, which were *obiter*, concerning the iniquities of unnamed members of the General Staff and High Command. In unrestrained language, the Tribunal denounced unidentified persons. It stated in its Judgment:

Where the facts warrant it, these men should be brought to trial so that those among them who are guilty of these crimes shall not escape punishment.<sup>16</sup>

One detects in such a pronouncement a measure of compromise in relation to Soviet views and those of the representatives of other Allied Powers.

The recommendation was gratuitous and beyond jurisdiction.

There is in the character of the organisations declared to be criminal at Nuremberg an analogy with contemporary perceptions of corporate crime. Braithwaite,<sup>17</sup> in his recent work on corporate crime in the pharmaceutical industry, emphasised that people in groups behave in ways that would be inconceivable for any of them as individuals. And so it was with some of the members of the organisations declared criminal at Nuremberg. By reason of that human trait, the inclusion of Articles 9, 10 and 11 in the London Charter was, in part, justified on pragmatic grounds, but the legality of their inclusion involves deeper considerations, which are examined in Chapter 18.

## NOTES

1. The Agreement was entitled 'An Agreement ... for the prosecution and punishment of the major war criminals of the European Axis'. The third paragraph of the preamble referred to 'major criminals'. Article 1 related to 'war criminals'. Further, Article 1 of the Charter was confined to 'the major war criminals of the European Axis'. This footnote is not a criticism.
2. Nuremberg Trial, I.M.T., vol. VIII, p. 353.
3. For example, Calvocoressi, Nuremberg: The Facts, the Law and the Consequences, Chatto and Windus, London, 1947, p. 79.
4. The 'Medical Case', the 'Pohl Case', the 'Flick Case', the 'I.G. Farben Case', and the 'Ministries Case'. (See the discussion of those cases in Chapter 13).
5. The Commission was directed by Lieutenant-Colonel A.M.S. Neave, a well-known writer on the Nuremberg trial. The Commissioners heard about one hundred witnesses called by defence counsel and considered over 300,000 affidavits. Some of those witnesses also gave evidence before the Tribunal. Some of the affidavits were presented in full to the Tribunal and the rest were summarised in the Commission's report. (Calvocoressi, op. cit., p. 78).
6. Nuremberg Trial, I.M.T., vol. XXII, p. 176.
7. Nuremberg Trial, I.M.T., vol. XXII, p. 297.
8. Woetzel, op. cit., pp. 190-217.
9. I.M.T. Judgment, p. 67.
10. This is illustrated by the analysis by Dr. J.A. Appleman, Military Tribunals and International Crimes, Indianapolis, 1954, of the concepts of conspiracy and the criminality of the named organisations, pp. 40-45. The discussion is joint: 'In either case, they involve collective responsibility, and so will be discussed together' (*ibid.*, p. 40).
11. Woetzel, op. cit., pp. 202-216.
12. Nuremberg Trial, I.M.T., vol. V, pp. 228-229. The full text of the President's announcement is reproduced as an Annexe to this Chapter.
13. I.M.T. Judgment, p. 66.
14. I.M.T. Judgment, p. 67.
15. I.M.T. Judgment, p. 81.
16. I.M.T. Judgment, p. 83.
17. Braithwaite, Corporate Crime in the Pharmaceutical Industry, Routledge & Kegan Paul, London, 1984, p. 3. The author observes: 'Borkin (1978) has documented in horrifying detail how today's leaders in the international pharmaceutical industry brutalised its slave labour force in their quest to build an industrial empire to match Hitler's political empire. After the war, the Allies insisted that none of the convicted war criminals be appointed to the boards of the new I.G. [Farben] companies. Once Allied control loosened, however, Hoechst in June 1955 appointed Friedrich Jaehne, one of the twelve war criminals sentenced to imprisonment at Nuremberg [the 'Farben Case'] to its supervisory board. In September of that year he was elected Chairman. Bayer appointed Fitzter Meer, sentenced to seven years at Nuremberg, as Chairman of



its board in 1956.'

ANNEXE TO CHAPTER 9

ANNOUNCEMENT BY THE PRESIDENT OF THE I.M.T.  
RELATING TO CRIMINAL ORGANISATIONS

The Tribunal has been giving careful consideration to the duty imposed upon it by Article 9 of the Charter.

It is difficult to determine the manner in which the representatives of the named organizations shall be permitted to appear in accordance with Article 9, without considering the exact nature of the case presented for the Prosecution.

For this reason, the Tribunal has come to the conclusion that, at this stage of the Trial, with many thousands of applications being made, the case for the Prosecution should be defined with more precision than appears in the Indictment.

In these circumstances, therefore, it is the intention of the Tribunal to invite argument from the Counsel for the Prosecution and for the defense, at the conclusion of the case by all prosecutors, in regard to the questions hereinafter set forth.

The questions which need further consideration are as follows:

1. The Charter does not define a criminal organization, and it is therefore necessary to examine the tests of criminality which must be applied and to decide the nature of the evidence to be admitted.

Many of the applicants who have made requests to be heard assert that they were conscripted into the organization, or that they were ignorant of the criminal purposes of the organization, or that they were innocent of any unlawful acts.

It will be necessary to decide whether such evidence ought to be received to rebut the charge of the criminal character of the organization, or whether such evidence ought more properly to be received at the subsequent trials under Article 10 of the Charter, when the organizations have been declared criminal, if the Tribunal so decides.

2. The question of the precise time within which the named organization is said to have been criminal is vital to the decision of the Tribunal.

The Tribunal desires to know from the Prosecution at this stage whether it is intended to adhere to the limits of time set out in the Indictment.

3. The Tribunal desires to know whether, in the light of the evidence, any class of persons included within the named organizations should be excluded from the scope of the declaration, and which, if any.

In the indictment of the Leadership Corps of the Nazi Party, the Prosecution have reserved the right to request the Politische Leiter of subordinate grades or ranks, or of other types or classes, be exempted from further proceedings without prejudice to other proceedings or actions against them.

Is it the intention of the Prosecution to make any such request? If so, it should be done now.

4. The Tribunal would be glad if the Prosecution would also:

(a) Summarize in respect of each named organization the elements which in their opinion justify the charge of being a criminal organization.

(b) Indicate what acts on the part of individual defendants, indicted in this Trial--in the sense used in Article 9 of the Charter--justify declaring the groups or organizations of which they are members to be criminal organizations.

(c) Submit in writing a summary of proposed findings of fact as to each organization, with respect to which a finding of criminality is asked.

The Tribunal hopes it is not necessary to say to the Prosecution that it is not seeking to interfere with the undoubted right of the Prosecution to present its case in its own way, in the light of the full knowledge of all the documents and facts which it possesses, but the duty of the Tribunal under Article 9 of the Charter makes it essential at this time to have the case clearly and precisely defined.

This announcement will be communicated to the Chief Prosecutors and to Defense Counsel in writing.

## CHAPTER 10 THE PROCEDURAL AND EVIDENTIAL FAIRNESS OF THE NUREMBERG TRIAL

### INTRODUCTION

The purpose of this chapter is to assess, in the light of the transcript of the trial, the degree of procedural and evidential fairness, so far as the defendants were concerned, which marked it. Fundamental to such an assessment is the view of the Tribunal, expressed in its judgment, that 'the law of the Charter is decisive and binding upon the Tribunal'.

There are several criteria for an assessment of the procedural fairness of the trial:

First, the provisions in the Charter which were expressed to be designed to 'ensure fair trial for the defendants' (Article 16, see *infra*).

Second, the prescribed course of the proceedings (Article 24, see *infra*).

Third, the rules of procedure drawn up by the Tribunal (Article 13 and Annexe I to this Chapter).

Fourth, the manner in which the Tribunal applied the prescribed provisions and rules, supplemented, where necessary, by rulings in respect of matters for which there was no prescription in the Charter. In the latter case, the Tribunal was not bound to follow any principles or rules of any particular national jurisprudence, but rather to apply the letter and the spirit of the laws of evidence and procedure practised in most civilised countries, although subject to the terms of the Charter.

All members of the Tribunal, including the alternate members, were eminent judges. No serious suggestion has been made by commentators that, in view of the provisions of the London Agreement and Charter, there was any conspicuous unfairness. However, there were a number of cases, for example that of the defendant Kaltenbrunner, in which the Tribunal's procedural fairness, and that of prosecuting counsel, can be questioned. Such cases are examined in this chapter by detailed references to the transcript.

Only the most outstanding matters of evidence and procedure are discussed in the text. Matters of lesser general importance are presented in Appendix I, to which notes are separately appended. All references to the transcript are derived from the twenty four volumes, including two index volumes, of the official text in the English language, published in accordance with the direction of the International Military Tribunal by the Secretariat of the Tribunal, under the jurisdiction of the Allied Control Authority for Germany. The remaining eighteen volumes of the series contain reprints of the documents admitted as evidence during the trial.

Of the twenty four accused persons named in the indictment when it was presented to the Tribunal in Berlin on 18 October 1945, only 22 remained as defendants when the trial began on 20 November. The reduction in the number was due to the suicide in his cell on 25 October 1945 of Robert Ley and the ruling of the Tribunal whereby Gustav Krupp von Bohlen und Halbach was severed from the proceedings.

Martin Bormann was presumed to be alive and at large, in the absence of any clear evidence to the contrary. He was tried in *absentia*.

Ernst Kaltenbrunner suffered a cranial haemorrhage and was a hospital patient. As a result he was present at the trial for only one period of a few days.

Article 12 of the Charter of the Tribunal was relevant in the cases of both Bormann and Kaltenbrunner. It provided:

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in

Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Counsel for two of the defendants, Rudolph Hess and Julius Streicher, applied to the Tribunal for an order dismissing the proceedings against their clients on the alleged grounds of their mental incapacity to stand trial. The manner in which the Tribunal dealt with these matters is discussed below.

## MATTERS AFFECTING INDIVIDUAL DEFENDANTS

### Gustav Krupp von Bohlen und Halbach

The name of Gustav Krupp von Bohlen was 13th on the list of twenty four defendants accused in the indictment. On 4 November 1945 counsel for Krupp, Dr. Klefisch, filed a motion by which he sought that the 'proceedings against this accused be deferred until he is again fit for trial ... I request that the accused be not tried in his absence.'<sup>1</sup> It was stated in the motion that Krupp, then 75 years of age, 'has for a long time been incapable of trial or examination owing to his severe physical and mental infirmities. He is not in a position to be in contact with the outside world nor to make or receive statements.' In support of the 'request' that the accused not be tried in his absence, Dr. Klefisch said:<sup>2</sup>

If by Article 12 of the statute (sic) the trial of an absent defendant is allowed then this exception to the rule can only be applied to a defendant who is unwilling to appear though able to do so. As is the case with the criminal procedure rules of nearly all countries, it is on this principle that the rules and regulations concerning the trial of absent defendants are based.

In an emotive answer to the motion, filed on 12 November on behalf of the United States, Mr. Justice Jackson said:<sup>3</sup>

Public interests, which transcend all private considerations, require that Krupp von Bohlen shall not be dismissed unless some other representative of the Krupp armament and munitions interests be substituted.

The answer described the part played by four generations of what was termed 'a Krupp family enterprise' and gave the following details of Alfried, the son of the accused Gustav Krupp von Bohlen:<sup>4</sup>

About 1937 ... Alfried Krupp became plant manager and was actively associated in policy-making and executive management thereafter. In 1940, Krupp von Bohlen, getting on in years, became Chairman of the Board of the concerns, thus making way for Alfried, who became President. In 1943, Alfried became sole owner of the Krupp enterprises by agreement between the family and the Nazi Government, for the purpose of perpetuating this business in Krupp family control.

On 14 November, Dr. Klefisch formally made the motion orally 'to suspend the proceedings against this defendant, at any rate not to carry out the trial against this defendant.'<sup>5</sup>

Mr. Justice Jackson opposed the motion as Chief of Counsel for the United States, and also on behalf of the Soviet Union and with the concurrence of the French prosecution. It was an address charged with emotion, at the end of which the President of the Tribunal said:

But you have stated have you not, and you would agree, that according to the municipal law of the United States of America, a man in the physical and mental condition of Krupp could not be tried.<sup>6</sup>

Mr. Justice Jackson replied: 'I think that would be true in most of the jurisdictions'.<sup>7</sup>

Sir Hartley Shawcross expressed the British view, which was in marked contrast to those of the other three prosecutors. He objected to any further delay and opposed any joinder of Alfried Krupp if it involved delays in the trial of the remaining defendants. Rule 2(a) of the Rules of the Tribunal, made pursuant to Article 13 of the Charter and adopted on 29 October 1945, provided that there should be a period of not less than 30 days between the service on a defendant of the indictment and the commencement of the trial. Despite this provision, Mr. Justice Jackson had proposed that if Alfried Krupp were joined in the indictment the trial could begin on 2 December. Mr. Justice Jackson did not present any argument justifying a departure from such a clear rule.

Sir Hartley Shawcross said:

This is a court of justice, not a game in which you can play a substitute, if one member of a team falls sick.<sup>8</sup>

The Tribunal gave its ruling on the motion on 15 November. It said that on 5 November it had appointed a medical commission of six experts, representative of the prosecuting Powers, who had unanimously reported to the Tribunal 'that Krupp von Bohlen suffers from senile softening of the brain; that his mental condition is such that he is incapable of understanding court procedure and of understanding or co-operating in interrogations; that his physical state is such that he cannot be moved without endangering his life; and that his condition is unlikely to improve but rather will deteriorate further'.<sup>9</sup>

In rejecting the United States submission, the Tribunal said: 'Where nature rather than flight or contumacy has rendered ... a trial impossible, it is not in accordance with justice that the case should proceed in the absence of a defendant'.<sup>10</sup>

The Tribunal formally made orders that '(1) the application for postponement of the proceeding against Gustav Krupp von Bohlen is granted; (2) the charges in the indictment against Gustav Krupp von Bohlen shall be retained upon the docket of the Tribunal for trial hereafter, if the physical and mental condition of the Defendant should permit ...'.<sup>11</sup>

The Tribunal added that further questions raised by the chief prosecutors, including the question of adding another name to the indictment, would be considered later.

On 16 November, a motion was filed by the Soviet, French and American chief prosecutors to designate Alfried Krupp as a defendant. The British prosecution did not join in the motion. The motion also sought that the relevant time period in respect of Alfried Krupp should be abridged from 30 days until 2 December. The Tribunal rejected the motion. Its ruling was thus tersely expressed:

The motion to amend the indictment by adding the name of Alfried Krupp has been considered by the Tribunal in all its aspects and the application is rejected.<sup>12</sup>

The Tribunal's ruling was correct and fair.

Martin Bormann

As the commencing day for the trial approached, Martin Bormann had not been located, although a number of special investigators had been engaged in an effort to ascertain his fate. On 17 November 1945 the Tribunal invited the prosecutors to submit their views on whether or not Bormann should be tried in his absence in accordance with Article 12 of the Charter.

On behalf of Great Britain, the United States and France, Sir David Maxwell-Fyfe summarised the information available about Bormann.<sup>13</sup>

Sir David Maxwell-Fyfe said:

... The prosecution cannot say that the matter is beyond probability that Bormann is dead. There is still the clear possibility that he is alive.<sup>14</sup>

The Soviet representative concurred in the suggestion on behalf of the prosecutors of the other three nations that, in the circumstances, it would be proper for Bormann to be tried in his absence. The Tribunal accepted this submission, and announced that counsel would be appointed to defend Bormann. Subsequently, Bormann's counsel moved for the postponement of the proceedings against Bormann. However, the Tribunal rejected the application. When its ruling was given on 22 November, the President said:

... in view of the fact that the provisions of the Charter and the Tribunal's rules of procedure have been strictly carried out in the notices which have been given, and the fact that counsel for Bormann will have ample time before he is called upon to present defense on his behalf, the motion is denied.<sup>15</sup>

On 13 October 1945 the Tribunal had made an order relating to notice to Bormann of the indictment against him, including a statement that he was entitled to be heard in person or by counsel. The manner of notice was thus stated:

This notice shall be read in full once a week for four weeks over the radio, the first reading to be during the week of October 22, 1945. It shall also be published in four separate issues of a newspaper circulated in the home city of Martin Bormann.<sup>16</sup>

The procedural ruling in respect of Bormann was correct and reasonable.

## Ernst Kaltenbrunner

The case of Ernst Kaltenbrunner presented the Tribunal with difficult problems. He had been a leading Nazi and involved at top level with police matters throughout the Reich. The particulars relating to him in Appendix A of the indictment were:

The defendant Kaltenbrunner between 1932-1945 was: a member of the Nazi Party, a General in the SS, a member of the Reichstag, a General of the Police, State Secretary for Security in Austria in charge of the Austrian Police, Police Leader of Vienna, Lower and Upper Austria, Head of the Reich Main Security Office and Chief of the Security Police and Security Service. The defendant Kaltenbrunner used the foregoing positions and his personal influence in such a manner that: he promoted the consolidation of control over Austria seized by the Nazi conspirators as set forth in Count One of the Indictment; and he authorized, directed and participated in the War Crimes set forth in Count Three of the Indictment and

the Crimes against Humanity set forth in Count Four of the Indictment, including particularly the Crimes against Humanity involved in the system of concentration camps.

On 18 November 1945, two days before the commencement of the trial, Kaltenbrunner suffered a spontaneous subarachnoid haemorrhage. He was admitted to hospital for treatment, but returned to the jail on 6 December. He was present at the session of the Tribunal on 10 December and for several days thereafter, but his condition deteriorated and he was readmitted to hospital.

When the defendants were, on 21 November 1945, required to plead to the indictment, the President said, in relation to Kaltenbrunner: 'In the absence of Ernst Kaltenbrunner, the Trial will proceed against him, but he will have an opportunity of pleading when he is sufficiently well to be brought back into court'.<sup>17</sup> In fact a plea of not guilty was entered at the commencement of the afternoon session on 10 December 1945.

On 2 January 1946, Kaltenbrunner's counsel, Dr. Kauffmann, applied for the postponement of the proceedings against him on the ground of his illness. The Tribunal's initial ruling was somewhat obscure. It was to the effect that (1) the prosecution should proceed with any evidence which it proposed to direct against the criminality of organisations with which Kaltenbrunner was connected, (2) any prosecution evidence directed against Kaltenbrunner as an individual should be withheld until the prosecution reached that part of its case in which it had planned to trace the responsibility of individual defendants, and (3) Kaltenbrunner's case should properly be left until the end of this section of the evidence. If at that time the defendant should still be unable to be present in court, the Tribunal ruled that 'the evidence will have to be given in his absence'.<sup>18</sup>

The potentially confusing practical result of this ruling could well have been due to the desire of the Tribunal to be seen as not unsympathetic to the situation of a seriously ill person charged with grave crimes. Certainly, it posed problems, both strategical and tactical, for defence counsel.

Following the ruling, submissions were made by prosecution and defence counsel to the Tribunal in closed session, and as a result the ruling was modified. Since it was considered impossible to separate prosecution evidence against Kaltenbrunner as an individual from that which was relevant to the organisations of which he was the head, the Tribunal decided it would hear the prosecution evidence in totality. However, Kaltenbrunner's counsel was given the right to cross-examine later any witnesses who gave evidence against him. Further, the Tribunal stated that defence counsel would have the opportunity to deal with any documentary evidence against him when the defence case was presented.<sup>19</sup>

Kaltenbrunner was indicted under Counts 1, 3 and 4. He was found not guilty under Count 1, but guilty on Counts 3 and 4. He was sentenced to death by hanging.

The discovery of the personal courtroom diaries of the senior American judge, Mr. Francis Biddle, has shed light on the manner in which the verdicts against Kaltenbrunner were reached—essentially by compromise, but against a background of certain knowledge by all the judges that the death sentence would follow a verdict of guilty on any Count. Such an attitude was inevitable in view of the strength of the case against Kaltenbrunner.<sup>20</sup>

One point of procedure remains unresolved in a consideration of the position of Kaltenbrunner. He stayed alive until he was hanged; yet his inability for health reasons, to be present at the trial during a lengthy and significant period made a successful defence impossible except under Count 1.

The trial of a person in a state of health similar to that of Kaltenbrunner would not have proceeded in a civilised country, irrespective of the inconvenience which might have been caused if his trial had been postponed. He could have been held in custody and tried before a military court when he was fit to be tried. The Nuremberg trial scenario would not thereby have been depreciated; rather it would have been enhanced.

The procedural decision concerning Kaltenbrunner was misconceived; however, it could be argued that few would be concerned because of the enormity of his alleged misdeeds. Such an argument is fallacious. A sound judicial approach in such a case should recognise that the greater the crime the more important it is to ensure that the person concerned receives a scrupulously fair trial. Kaltenbrunner did not receive such a trial.

## Streicher

On 15 November 1945, counsel for Julius Streicher, Dr. Marx, 'suggested' orally to the Tribunal that there be a psychiatric examination of his client. He said:

Defense Counsel should have at his disposal all the evidence on the nature, personality and motives of the defendant which appears necessary to enable him to form a clear picture of his client.

In my own interests I consider it essential that such an examination be authorized by the Tribunal. I emphasize particularly that this is not a formal motion ... I deem it necessary as a precaution in my own interests, since my client does not desire an examination of this sort, and is of the opinion that he is mentally completely normal. I myself cannot determine that; it must be decided by a psychiatrist.<sup>21</sup>

The Tribunal required that the 'suggestion' should be in the form of a written motion or application. The President said:

... if, as you say, the defendant Streicher does not wish it or is unwilling that such an examination should be made, then your application ought to state in writing that the Defendant Streicher refuses to sign the application.<sup>22</sup>

On 22 November 1945, the President said that Streicher had been examined by three medical experts on behalf of the Tribunal, who had submitted a report to the Tribunal as follows:

1. The Defendant Julius Streicher is sane.
2. The Defendant Julius Streicher is fit to appear before the Tribunal, and to present his defense.
3. It being the unanimous conclusion of the examiners that Julius Streicher is sane, he is for that reason capable of understanding the nature and policy (sic) of his acts during the period of time covered by the indictment.<sup>23</sup>

The President said that the Tribunal accepted the report of the medical experts and that the trial of Streicher would proceed.

There is no basis for impugning the Tribunal's ruling. Streicher gave and made a final 'statement'. It appears from the transcript that he was coherent and lucid.

## Hess 23a

Probably the real reason will never be known why Rudolph Hess, on 10 May 1941, flew a German Messerschmitt pursuit-fighter from Augsburg, near the German city of Munich, to the estate of the Duke of Hamilton, in south-west Scotland, where he parachuted to safety. He was subsequently interned and at the end of



the war was returned to Nuremberg where he was indicted under all four Counts. He was found guilty on the first two Counts but not guilty under Counts three and four. In its judgment, the Tribunal said:<sup>24</sup>

As previously indicated the Tribunal found, after a full medical examination of and report on the condition of this defendant, that he should be tried, without any postponement of his case. Since that time further motions have been made that he should again be examined. These the Tribunal denied, after having had a report from the prison psychologist. That Hess acts in an abnormal manner, suffers from loss of memory, and has mentally deteriorated during this trial, may be true. But there is nothing to show that he does not realise the nature of the charges against him, or is incapable of defending himself. He was ably represented at the trial by counsel, appointed for that purpose by the Tribunal. There is no suggestion that Hess was not completely sane when the acts charged against him were committed.

Immediately after his arrival in England Hess acted in a bizarre fashion. In the Nuremberg prison, he asserted consistently that he was suffering from amnesia and was unable to recollect facts concerning his past activities.

On 7 November 1945, his then counsel, Dr. von Rohrscheidt, filed with the Tribunal a motion that a medical expert 'make a thorough examination of the Defendant Hess and report in an exhaustive manner as to whether the said defendant is (a) mentally competent, (b) capable of being tried, and to summon the medical expert at the Trial'. It was stated in the motion that:

... The defendant is not in a position to give his Counsel any information whatsoever regarding the crimes imputed to him in the Indictment. The expression of his face is lifeless and his attitude towards his Counsel and in view of the impending Trial is the reverse of every natural reaction of any other defendant. The defendant declares that he has completely lost his memory since a long period of time, the period of which he can no longer determine.<sup>25</sup>

On 24 November 1945 the Tribunal rejected the motion because it sought the appointment of an expert designated by the medical faculty of either the University of Zurich or of Lausanne to examine Hess. Instead, the Tribunal designated a commission of 10 members from the four prosecuting Powers, headed by Dr. E. Krasnushkin, Professor of Psychiatry at the Medical Institute of Moscow. The President of the Tribunal said the reports of the examiners had been received and appointed 30 November as the date on which the arguments of counsel would be heard.<sup>26</sup>

Three separate reports were submitted by members of the Commission. The conclusions were not unanimous. On the issue of current insanity, they varied from the view that he was not suffering from any form of insanity to the qualified judgment, that he was not insane 'in the strict sense'; Seven members of the ten-man commission expressed the latter view.<sup>27</sup>

On 29 November, counsel for Hess filed a motion seeking: (a) The adjournment of the proceedings temporarily; (b) That in case incapacity to be tried is "asserted", proceedings *in absentia* against the defendant should not be carried on; and (c) that if an adjournment should be denied "a super (sic) expert opinion be obtained from additional eminent Psychiatrists".<sup>28</sup>

On the same day, answers were filed by the four chief prosecutors in which they stated 'we do not challenge or question the report of the Committee' (sic). Further, 'it is our position that the defendant Rudolph Hess is fit to stand trial'.<sup>29</sup>

The United States filed additional observations relating to the motion, including a report on Hess by an officer of the Medical Corps of the United States Army of the rank of major. The report, dated 16 October 1945, whilst describing Hess as 'a profound neurotic of the hysterical type', asserted he was 'sane and responsible'.<sup>30</sup>

Whatever decision the Tribunal might have reached on the basic issue of whether or not Hess was fit to stand trial<sup>31</sup> was pre-empted when, at the afternoon session on 30 November 1945, Hess said:

Mr. President: At the beginning of this afternoon's proceedings, I handed my defense counsel a note stating that I am of the opinion that these proceedings could be shortened if I could speak briefly. What I have to say is as follows: In order to prevent any possibility of my being declared incapable of pleading—although I am willing to take part in the rest of the proceedings with the rest of them, I would like to make the following declaration to the Tribunal although I originally intended not to make this declaration until a later time. My memory is again in order. The reason why I simulated loss of memory was tactical. In fact, it is only that my power for concentration is slightly reduced but in conflict to that my capacity to follow the trial, my capacity to defend myself, to put questions to witnesses or even to answer questions—in these, my capacities are not influenced. I emphasize the fact that I bear full responsibility for everything that I have done, signed or have signed as co-signatory. My fundamental attitude that the Tribunal is not legally competent, is not affected by the statement I have just made. Hitherto, in my conversations with my official defense counsel, I have maintained my loss of memory. He was, therefore, acting in good faith when he asserted I had lost my memory.<sup>32</sup>

In the light of the statement of Hess, the ruling of the Tribunal, given on the following day, was inevitable. It was:<sup>33</sup>

The Tribunal has given careful consideration to the motion of Counsel for the Defendant Hess, and it has had the advantage of hearing full argument upon it both from the Defense and from the Prosecution. The Tribunal has also considered the very full medical reports, which have been made on the condition of the Defendant Hess, and has come to the conclusion that no grounds whatever exist for a further examination to be ordered. After hearing the statement of the Defendant Hess in court yesterday, and in view of all the evidence, the Tribunal is of the opinion that the Defendant Hess is capable of standing his trial at the present time, and the motion of Counsel for the Defense is, therefore, denied, and the trial will proceed.

It is of value to compare this decision of the Tribunal, at the end of November 1945, with the subsequent evidence and its decision, announced on 20 August 1946 in response to a motion by counsel for Hess, then Dr. Seidl, on 2 August 1946. The 'motion, which reviews at length the previous examinations and psychiatric history of Defendant Hess, was a request "to subject the Defendant Hess once more ... to an examination by psychiatric experts with regard to his ability to stand trial and his soundness of mind."<sup>34</sup> The motion led to a report on the mental competence of Hess by the prison psychologist, Dr. G.M. Gilbert, which is reproduced verbatim in a note.<sup>35</sup>

In that report, Dr. Gilbert firmly expressed the view that Hess was not insane in a legal sense.

The Tribunal ruled that the trial of Hess would continue. It added: 'The Tribunal will not call for any further report upon the defendant Hess at the present time'.

In view of the expert psychiatric and psychological opinions and the personal statement of Hess that he had simulated loss of memory for 'tactical' reasons, no other ruling could have been justly made at any stage of the trial of Hess. In this respect, there was no procedural unfairness.

## RULES OF PROCEDURE

There was no legal precedent for the procedural rules to which the Nuremberg trial was subject because it was unique. Nevertheless, it was necessary for clear and detailed procedural provisions to be made applicable to the trial, in amplification of the provisions in the Charter (see *infra* this Chapter)

Article 13 of the Charter required the Tribunal to draw up rules for its procedure, not inconsistent with the provisions of the Charter.

In accordance with this requirement, by which in practical terms the Tribunal was bound, it adopted on 29 October 1945 rules of procedure, which, in the view of the author, were not surpassed in fairness by the then current procedural codes or practice of any western nation. A copy of those rules of procedure is reproduced as Annexe 1 to this chapter.

Rule 11 was significant for the self-imposed restraint on the Tribunal. It provided that the rules were subject to amendment, but only 'in the interest of fair and expeditious trials'. Rule 11 could have become significant in the case of, the Krupp family (see previous section in this chapter), but the Tribunal's ruling made it irrelevant.

Elaborate proof was given of compliance with the orders of the Tribunal regarding notice to individual defendants, to members of groups and organisations and to the defendant Bormann.

In form the rules of procedure were completely fair and just.

## THE PRESIDENT'S OPENING STATEMENT

On 20 November 1945, before the accused were called upon to plead to the indictment, the President made a preliminary statement in which he set the stage for the trial in unimpassioned language. He emphasised that the purpose of the establishment of the Tribunal was the 'just and prompt trial and punishment of the major war criminals of the European Axis' (Article 1 of the Charter).

The statement was a firm, but fair, indication of the manner in which the Tribunal would conduct the trial, which the President said 'is unique in the history of the jurisprudence of the world and ... is of supreme importance to millions of people all over the globe'.

The fact that the statement referred to the 'punishment' of those on trial was understandable in view of the provisions of Article 1 of the Charter.

The statement is contained in Annexe II to this Chapter.

## THE PRESENTATION OF EVIDENCE BY THE PROSECUTION

On the third day of the trial, 22 November 1945, Col. Storey, one of the two United States executive trial counsel, began the presentation of evidence on Count 1. It had been agreed between the four prosecution teams that primary responsibility for the presentation of the prosecution cases should be divided as follows:

Count 1: United States

Count 2: Great Britain

Counts 3: and 4: France as 'to crimes in Western Occupied countries and Russia in respect of the Eastern countries.

Col. Storey described in meticulous detail the methods by which 'literally hundreds of tons of enemy documents and records were screened and examined'.<sup>36</sup> His description was supported by a lengthy affidavit by Major W.H. Coogan, then Chief of the Documentation Division, Office of the United States Chief of Counsel, in which it

was certified: 'all documentary evidence offered by the United States Chief of Counsel, including those documents from British Army sources, are in the same condition as captured by the United States and British Armies; that they have been translated by competent and qualified translators; that all photostatic copies are true and correct copies of the originals and that they have been correctly filed, numbered and processed ...'<sup>37</sup>

Written briefs were made available to the Tribunal and defence counsel on each phase of the American case, including a citation of all documents and legal propositions, accompanied by a document brief containing copies in English of all documents referred to in the brief. It was intimated that copies in the German language of documents to be tendered in evidence had been, or would be, furnished to defence counsel. More than 2,500 documents had been filed in the Court House, of which it was intended that at least several hundred would be offered in evidence.

At times, the massive task of furnishing copies of documents to defence counsel in the German language led to problems in the court room, but a perusal of the transcript shows that the President was astute to ensure that the defence counsel would not be prejudiced. For example, at one stage of the third day of the trial, the President said:

The Tribunal is glad that defendants' counsel are making efforts to co-operate in the Trial. After the adjournment, the Tribunal will consider the best method of providing defendants' counsel with as many translations as possible, and you are right in thinking that you will be able to make objections to any document after you have had time to consider it.<sup>38</sup>

The sheer volume of the documentary evidence obviously posed a problem for defence counsel, and to some degree for the Tribunal. After a discussion with counsel, the President said: Every document, when it is put in, becomes a part of the record and is in evidence before the Tribunal, but it is open to the defendants to criticize and comment upon any part of the document when their case is presented'.<sup>39</sup>

As the trial progressed, there was increasing difficulty with respect to the availability to defence counsel, and the defendants, of copies of documents in the German language. Following a conference between counsel for the prosecution and the defence, the President, on 26 November, announced the following provisional arrangement:<sup>40</sup>

1. That in the future, only such parts of documents as are read in court by the Prosecution shall in the first instance be part of the record. In that way those parts of the documents will be conveyed to defendants' counsel through the earphones in German.
2. In order that defendants and their counsel may have an opportunity of inspecting such documents in their entirety in German, a photostatic copy of the original and one copy thereof shall be deposited in the defendants' counsel room at the same time as they are produced in court.
3. The defendants' counsel may at any time refer to any other part of such documents.
4. Prosecuting counsel will furnish defendants' counsel with 10 copies of their trial briefs in English and five copies of their books of documents in English, at the time such briefs and books are furnished to the Tribunal.
5. Defendants' counsel will be furnished with one copy of each of the transcripts of the proceedings.

Such a procedure appears reasonable. However, it is apparent from a perusal of the transcript containing the submissions of counsel that the arrangement would not have been achieved if the Tribunal had not made it clear on a number of occasions that it would not permit defence counsel or the defendants to be prejudiced by their not being furnished with copies of documents in the German language in a timely manner.

On another occasion, the President dealt firmly with United States counsel. It emerged in the course of the

opening that about 250 copies of documents in the English language were made available to the Press. Under the provisional arrangement (*supra*), only five copies were to be available to defence counsel and the defendants. The President tersely observed:

If you can afford to give 250 copies of the documents in English to the Press, you can afford to give more than five copies, to the defendants' counsel—one each. ... In the future that will be done.<sup>41</sup>

## AFFIDAVIT EVIDENCE

There were numerous instances of challenges by defence counsel to the probative value of affidavit material. An early example was an affidavit by George S. Messersmith relating in particular to the defendant von Papen and to some extent to the defendant Doenitz. The United States prosecutor objected to a submission by counsel for von Papen that the deponent, who lived in New Mexico, should be called as a witness. Although the Tribunal overruled the defence submission--and, it is argued, rightly did so--it stressed the rights of the defendants in such circumstances. The President said:<sup>42</sup>

The Tribunal has already ruled that the affidavit is admissible; that its probative value will of course be considered by the Tribunal, and the defendants' counsel have the right, if they wish, to submit interrogatories for the examination of Messersmith. Of course, defendants will have the opportunity of giving evidence when their turn comes, then Admiral Doenitz, if he thinks it right, will be able to deny the statements of the affidavit.

On the same day, the Tribunal considered an objection by counsel for the defendant Seyss-Inquart, Dr. Latenser, to the admissibility of an affidavit by Kurt von Schuschnigg, formerly Foreign Chancellor of Austria, which was executed at Nuremberg on 19 November 1945. In a considered ruling, the Tribunal upheld the objection, and the President said: <sup>43</sup>

If the Prosecution desires to call von Schuschnigg as a witness, it can apply to do so. Equally if the Defense wishes to call von Schuschnigg as a witness, it can apply to do so. In the event von Schuschnigg is not able to be produced, the question of affidavit evidence by von Schuschnigg being given will be reconsidered.

There were numerous successful objections to the use by the prosecution of affidavit evidence.<sup>44</sup> In the instances cited above, the Tribunal's rulings were clearly correct. Later in the trial, two further somewhat similar evidentiary issues concerning affidavit evidence arose. In the first such instance, the affidavit was admitted, but the Tribunal said:

It is open to the defendants' counsel, in accordance with the Charter and the Rules, to make a motion, in writing, if they wish to do so, for the attendance of [the deponent] for cross-examination and to state in that motion the reasons therefor.

The second such case immediately arose and the Tribunal made the same ruling .

The latter two rulings should be considered in the light of the detailed facts pertaining to each and not as establishing any precedent. It is difficult to argue that either ruling was incorrect.

## OUR SPECIAL RULINGS

- (a) Near the end of the cross-examination of a prosecution witness, Dr. Stahmer, counsel for the defendant Goering, sought what he termed 'a fundamental ruling on whether the defendant also has the right personally to ask the witness questions. According to the German text of the Charter, Paragraph 16, I believe this is permissible'.<sup>45</sup>

The submission was opposed by Mr. Justice Jackson. The Tribunal retired to consider the question, and when the trial resumed the President said:

The Tribunal has carefully considered the question raised by Dr. Stahmer, and it holds that defendants who are represented by counsel have not the right to cross-examine witnesses. They have the right to be called as witnesses themselves and to make a statement at the end of the Trial.<sup>46</sup>

Dr. Stahmer's submission was based on Article 16 (e) of the Charter which provided that 'a defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution'.

The ruling of the Tribunal was expedient but doubtfully correct as a matter of the strict and literal construction of Article 16 (e). One does not have to adopt the words of Mr. Justice Jackson that a ruling in accordance with Dr. Stahmer's submission would cause the proceedings 'to become a performance rather than a trial'. However, the whole proceedings would have become unacceptably prolonged and unwieldy if the ruling had been otherwise. The problem arose because of the inept drafting of Article 16 (e).

- (b) When the trial was resumed on 6 December 1945, the President said he had received an urgent request from the defendants' counsel that the Trial be adjourned at Christmas for a period of three weeks. The President said: 'the Tribunal considers that it is not only in the interest of the defendants and their counsel but of everyone concerned in the Trial that there should be a recess.' The decision was that the Tribunal would not sit after 20 December 1945 until 2 January 1946. In all the circumstances it was a fair decision, but this patent fact did not prevent Mr. Justice Jackson from saying: 'I should like, in justice to my staff, to note the American objection to the adjournment for the benefit of the defendants (emphasis added).'<sup>47</sup>

The American Chief of Counsel was factually in error. The adjournment was not simply for the benefit of the defendants but for the reasonable convenience of all involved in the trial.

- (c) Dr. Stahmer, counsel for the defendant Goering, objected to the tendering in evidence of an extract from the pre-trial interrogation of Goering which had been taken on 29 August 1945. The President overruled the objection on the ground that Article 15 (c) of the Charter provided for the preliminary examination of the defendants and Articles 16 (b) and 16 (c) respectively provided that 'during any preliminary examination ... of a Defendant he shall have the right to give any explanation relevant to the charges ...' and that 'a preliminary examination of a defendant shall be conducted in, or translated into, a language which the Defendant understands'. The ruling was that the interrogations of the defendants could be put in evidence.<sup>47</sup>

This ruling was correct and in accordance with British and American laws of evidence. In particular, the evidence was explicitly relevant in the context because Goering's answer to a question during his interrogation had been:<sup>48</sup>

On the day when England gave her official guarantee to Poland, the Fuehrer called me on the telephone and told me that he had stopped the planned invasion of Poland. I asked him then whether this was just temporary or for good. He said 'No, I will have to see whether we can eliminate British intervention'.

## EVIDENCE TENDERED IN THE FORM OF FILM

A strikingly effective course was taken by prosecution counsel for the United States, without any objection by defence counsel, when it tendered in evidence a motion picture entitled 'The Nazi Plan'. It was divided into four parts:

- |        |   |  |
|--------|---|--|
| Part 1 | - | 'The Rise of the N.S.D.A.P., 1921 to 1933';                |
| Part 2 | - | 'Acquiring Totalitarian Control of Germany, 1933 to 1935'; |

- Part 3 - 'Preparation for Wars of Aggression, 1935 to 1939'; and
- Part 4 - 'Wars of Aggression, 1939 to 1944'.

All the film, including pictures of early Nazi newspapers, was original German film, to which the prosecution added only the titles in English. All German narration heard was in the original form as filmed by the Nazis.<sup>49</sup> The showing of the film occupied most of the trial on 11 December 1945. The original films were made part of the permanent records of the Tribunal.

The tactic of showing the film was legally legitimate. It was admissible to the extent to which it was relevant in accordance with the indictment. Its effect must have been devastating in respect of all Counts. In particular, it enabled the prosecution, in effect, to begin its case from the year 1921 and continue it, against a background of authentic German Film, until 1944.

The Tribunal did not question the admissibility of the film; nor did it make any comment.

On 13 December 1945, a short strip of silent motion pictures, made on an 8-millimeter home camera, was shown to the Tribunal. Counsel for the United States claimed that the film 'offers undeniable evidence, made by Germans themselves, of almost incredible brutality to Jewish people in the custody of the Nazis, including German military units'.<sup>50</sup> Counsel said it was believed that the film was taken by a member of the SS; it had been captured by the United States military forces in an SS barracks near Augsburg, Germany. The film showed a number of persons in German military uniform, but no individual was identified. As described, the film depicted scenes of disgusting horror. The film had had been shown beforehand to all defence counsel. It was not suggested that any of the defendants was involved in the scenes depicted. No objection was made to the admissibility of the film, nor, again, did the Tribunal make any comment.

In view of the particulars furnished under Count 3, the film was admissible as part of the res gestae.

On the same basis, a number of photographs were projected on the screen in the court room on 14 December 1945 without objection. They depicted the liquidation (a word used at Nuremberg as a euphemism for 'killing') of Jews by the destruction of buildings by fire and explosives.<sup>51</sup>

All the evidence tendered in the form of film was admissible, having regard to the terms of the indictment. Significantly, no counsel for the accused objected. However, the tendering of the film evidence, although strictly admissible, could well have been challenged on the basis of the recognised discretion of a Court to exclude such evidence.

## THE TENDERING IN EVIDENCE OF PARTS ONLY OF DOCUMENTS

On numerous occasions, defence counsel complained to the Tribunal that the prosecution, mainly the United States, sought to tender in evidence parts only of documents and omitted other parts which were relevant. The complaint usually was that the omission of some relevant parts of a document was calculated to prejudice a defendant, because a true and complete assessment of the probative value of a document was not possible if portions of significance, at least in the opinion of defence counsel, were omitted. A perusal of the transcript shows that in all cases the rulings of the Tribunal reflected its scrupulous attitude that there should be no basis for any complaint of prejudice by any defendant. Early examples of this attitude are:<sup>52</sup>



Dr. Thoma: [Counsel for the accused Rosenberg]: I know only one thing: I already have in my hand the document which the Prosecution wishes to submit and I can see from it that it contains only fragments of the whole interrogation. What in particular it does not contain is the fact that Rosenberg always insisted on voluntary recruiting only and that he continually demanded a reduction of the quota. That is not contained in the document to be submitted.

The President: If counsel for the Prosecution reads a part of the interrogation, and you wish to refer to another part of the interrogation in order that the part he has read should not be misleading, you will be at liberty to do so when he has read his part of the interrogation. Is that clear?

The President: Mr. Dodd, [United States Executive Trial Counsel] the Tribunal considers that if you propose to put in a part of the interrogation, the whole interrogation ought to be submitted to the defendant's counsel, and then you may read what part you like of the interrogation, and then defendant's counsel may refer to any other part of the interrogation, directly if it is necessary, for the purpose of explaining the part which has been read by counsel for the Prosecution. So before you use this interrogation, Rosenberg's counsel must have a copy of the whole interrogation.

The President: But of course that doesn't quite meet their difficulties because they [German Counsel] don't all of them speak English, or are not all able to read English, so I am afraid you must wait until Rosenberg's counsel has got a copy of the entire interrogation in his own language.

## THE CASE AGAINST THE 'INDICTED' ORGANISATIONS

A fundamental ruling was made by the Tribunal on 14 December 1945 on an application by Mr. Justice Jackson, which was summarised in these terms by the President of the Tribunal:<sup>53</sup>

That the question of the criminality of these organisations should not be argued before the evidence is put in; that the United States counsel should put in their evidence first, and that they hope to put the majority of it in evidence before the Christmas recess, but that the German counsel (defendants' counsel) shall be at liberty at any time, up to the time the United States case is finished, to make objection to any part of the evidence on these criminal organisations.

The Tribunal ruled in favour of this application, despite initial objection by defence counsel.

It is clear from the transcript that the President intended also to reserve to counsel for the defendants the right to make legal submissions in respect of the 'indicted' organisations, as well as to object to any part of the evidence, after the evidence had been tendered and before the United States case was closed.

This ruling was fair. It had the advantage of saving considerable time. There was force in the argument of Mr. Justice Jackson that unless the course he proposed were taken 'piecemeal argument ... would not be orderly, but would be repetitious, incomplete, poorly organised and of little help to the Tribunal. The issues deserve careful, prepared presentation of the contentions on both sides.'<sup>54</sup>

## THE BREADTH OF DOCUMENTARY EVIDENCE

There were obvious difficulties in tendering documents in cases in which the prosecution desired to rely only on portions of them. The Tribunal, at an early stage, made a formal order that only such portions of documents which were read in court would be admitted as evidence.<sup>55</sup> This practice was not always satisfactory and, on 17 December 1945, the initial order was replaced by the following order:<sup>56</sup>

All documents may be filed in court. The Tribunal shall only admit in evidence, however:

1. Documents or portions of documents which are read in court;
2. Documents or portions of documents which are cited in court,

Such an order was eminently fair. It put a brake on the practice which had developed, particularly in the case of United States counsel, of their tendering a substantial document but, on being questioned by the President, declining to read to the court more than a small fraction of it. Moreover, there were numerous instances in which the President intervened to indicate to prosecution counsel that they should read certain additional parts of a document, obviously to present a more complete and balanced picture.

Experienced counsel are aware that, especially in an extremely long trial, it is not proper for the prosecution to refer to part only of a document, and leave it to counsel for an accused, at a remote date, to refer again to the document in order, in evidence, to elicit an exculpatory explanation from his or her client.

There was one such example on 10 January 1946, during the presentation of the detailed individual case against the defendant Frank, who at all relevant times was Governor General of Occupied Poland. The transcript illustrates the fairness of the Tribunal.<sup>57</sup>

The President: Lieutenant Colonel Baldwin [American Assistant Trial Counsel]: I asked you what was the whole content of the document from which you were reading this paragraph. According to counsel for Frank, the document, which is a very long document, shows that Frank was suggesting remedies for the difficulties which he here sets out. Is that so?

Lt. Col. Baldwin: That is so ... I did not cite this portion of that document, as I will later demonstrate, to show that Frank did or did not suggest remedies for these conditions, but only to explain that these conditions existed as of a certain period.

The President: Well, when you cite a small part of the document, you should make sure that what you cite is not misleading as compared to the rest of the document. ... The Defendant Frank's counsel will speak at some remote date, and it is not a complete answer to say that he will have an opportunity of explaining the document at some future date. It is for Counsel for the Prosecution to make sure that no extracts which they read can reasonably make a misleading impression upon the mind of the Tribunal.

The Tribunal (Mr. Biddle) to defence counsel: ... What is not satisfactory to the Tribunal is that you did not give us the real purport of the document.

The President: What we would like, would be, if possible, that when an extract is made from a document, counsel who are presenting that extract should instruct themselves as to the general purport of the document so as to make certain that the part that is read is not misleading.

There was another example on the following day, when American counsel, in the presentation of the case against the defendant Schacht (who was acquitted on both the Counts under which he was charged) read portion only of a

document. The President said to defence counsel:<sup>58</sup>

I am not sure that that gives a full or quite fair interpretation of the document. Don't you think perhaps you ought to read the paragraph before?

And, again,<sup>59</sup> the President later said:

Are you going to read the passage that follows that at a later stage?

## THE ALLEGED INTRUSION OF THE VATICAN

The strength and the prudence of the Tribunal, especially of the President, are illustrated by the following exchange between defence counsel and the Tribunal during the presentation of supplemental evidence concerning 'the suppression of the Christian Churches in Germany and in the Occupied Territories'. The American prosecution had said that 'a large part of this proof will be from the official files of the Vatican'.<sup>60</sup>

During the presentation of the evidence, Dr. Seidl, counsel for the defendant Frank, intervened and said:<sup>61</sup>

The United States Prosecution said earlier in the proceedings that a certain part of the material now being presented as evidence in the question of the opposition to the churches was made available by the Vatican. The Defendant Frank has just sent me some questions which I do not want to withhold from the Tribunal. The questions are these:

1. Is the Vatican a Signatory to the Charter of the International Military Tribunal?
2. Did the Vatican deliver the material in an accusatory capacity?
3. Has the Vatican, acting as a co-prosecutor, identified itself with the principles of these proceedings?

The Defendant Frank adds by way of explanation that his continued membership in the Roman Catholic Church depends on the reply to these questions.

After the President had sought the restatement of the questions and the members of the Tribunal had conferred, the President said:<sup>62</sup>

In the opinion of the Tribunal the observations which have just been made by counsel on behalf of the Defendant Frank are entirely irrelevant, and any motion which they were intended to support is denied. The Prosecution will therefore continue.

## DID THE TRIBUNAL MEMBERS KEEP OPEN MINDS?

The Tribunal members professed that in the course of the extremely long trial they had open minds on the factual matters which were the subject of evidence. For example, during the presentation of evidence relating to

concentration camps by M. Dubost, Deputy Chief Prosecutor for the French Republic, the transcript records:<sup>62a</sup>

M. Dubost: These two days of testimony will obviate my reading the documents any further, since it seems established in the eyes of the Tribunal, that the excesses, ill-treatment, and crimes which our witnesses have described to you, occurred repeatedly and were identical in all the camps; and therefore are evidence of a higher will originating in the government itself, a systematic will of extermination and terror under which all occupied Europe had to suffer. Therefore I shall submit to you only, without reading them, the documents we have collected, and confine myself to a brief analysis whenever they might give you ...

The President [interrupting]: M. Dubost, you understand, of course, that the Tribunal is satisfied with the evidence it has heard up to date; but, of course, it is expecting to hear evidence, or possibly may hear evidence, from the defendants; and it naturally will suspend its judgment until it has heard that evidence, and, as I pointed out to you yesterday, I think, under Article 24(e) of the Charter, you will have the opportunity of applying to the Tribunal, if you think it right, to call rebuttal evidence in answer to any evidence which the defendants may call. All I mean to indicate to you now is that the Tribunal is not making up its mind at the present moment. It will wait until it has heard the evidence for the Defense.

No doubt the President's, cited statement was appropriate in the circumstances, but on the next day, following the first recess, he stated:<sup>63</sup>

M. Dubost, the Tribunal has been considering the question of the evidence which you have presented on the concentration camps; and they are of the opinion that you have proved the case for the present, subject, of course, to any evidence which may be produced on behalf of the defendants, and, of course, subject also to your right under Article 24(e) of the Charter to bring in rebutting evidence, should the Tribunal think it right to admit such evidence. They think, therefore, that it is not in the interests of the Trial, which the Charter directs should be an expeditious one, that further evidence should be presented at this stage on the question of concentration camps, unless there are any particular new points about the concentration camps to which you have not yet drawn our attention; and, if there are such points we should like you to particularise them before you present any further evidence upon them.

M. Dubost: I shall, therefore, consider as established provisionally the proof that Germany, in its internment camps and concentration camps, pursued a policy tending towards the annihilation and extermination of its enemies, while at the same time creating a system of terror which it exploited to facilitate the realisation of its political aims.

The above cited statement by the President, made on the 46th day of a trial which occupied a total of 218 days, was not calculated to create an impression of a Tribunal with completely open minds. It is true that the need for an expeditious trial was emphasised in the Charter, but the statement left the Tribunal open to the criticism that it had made, at least provisionally, findings of fact against most of the accused. The statement was gratuitous and unnecessary, as the initial statement would have been sufficient to expedite the presentation of evidence.

## 'SPEECHES' BY PROSECUTION COUNSEL

Despite the fact that counsel for the defendants were frequently advised

by the Tribunal--and properly so--that they should not make speeches during the conduct of the trial except in accordance with the procedural provisions of the Charter, no effective constraints were uniformly imposed on the prosecution.

Article 24 of the Charter prescribed the course which the proceedings at the trial should take. The criticism of the liberty which the Tribunal allowed the prosecution which is contained in this section of this chapter, requires an appreciation of the details of the prescribed procedural course. Article 24 of the Charter provided

The proceedings at the Trial shall take the following course:

- (a) The Indictment shall be read in court.
- (b) The Tribunal shall ask each Defendant whether he pleads "guilty" or "not guilty".
- (c) The Prosecution shall make an opening statement. (emphasis added).
- (d) The Tribunal shall ask the Prosecution and the Defence what evidence (if any) they wish to submit to the Tribunal, and the Tribunal shall rule upon the admissibility of any such evidence.
- (e) The witnesses for the Prosecution shall be examined and after that the witnesses for the Defence. Thereafter such rebutting evidence as may be held by the Tribunal to be admissible shall be called by either the Prosecution or the Defence.
- (f) The Tribunal may put any question to any witness and to any Defendant at any time.
- (g) The Prosecution and the Defence shall interrogate and may cross-examine any witnesses and any Defendant who give testimony.
- (h) The Defence shall address the Court.
- (i) The Prosecution shall address the Court.
- (j) Each Defendant may make a statement to the Tribunal.
- (k) The Tribunal shall deliver judgment and pronounce sentence.

The presentation of the case against the defendants was divided among the four prosecution delegations on the basis already outlined in this chapter. Many counsel participated in the course of opening comments on evidence to be adduced, the tendering of trial briefs and document books. In virtually all cases there were 'speeches' and comments, embellished by rhetoric. The Tribunal did not effectively restrain prosecution counsel, despite the clear provisions of Article 24 of the Charter, in particular paragraph (c).

There are many instances in the transcript of excessively long and inflammatory speeches by prosecuting counsel. An example which illustrates that criticism relates to the French prosecution. Having, in his own words, 'completed his presentation of facts', M. Dubost, Deputy Chief Prosecutor for the French Republic, made an impassioned speech relating to the facts and law, which culminated in a quotation from the Bible. He was immediately followed by M. Faure, also a French Deputy Chief Prosecutor, who continued the 'opening' at extreme length, interspersed with comments.<sup>64</sup>

Near the end of the presentation of the French case, the President mildly intervened as follows:

M. Faure, you will forgive my interrupting you, but the Tribunal feels that what you are now presenting to us, however interesting--and it is interesting--is really an argument and is not presenting evidence to us. And as we have already heard an opening on behalf of the United States, an opening on

behalf of Great Britain, and an opening on behalf of France, we think that you really ought to address yourself, if possible, to the evidence which you are presenting rather than to an argument.<sup>65</sup>

The 'opening' of the case of the French prosecution continued, however, at uncontrolled length. M. Mounier, Assistant Prosecutor for the French Republic, appeared to ignore attempts by the President to confine his presentation to an outline of evidence as distinct from argument. He blatantly made passionate speeches and emotive comments.<sup>66</sup> The President did say to M. Mounier that he should confine himself to a presentation of the evidence,<sup>67</sup> but counsel persisted.

The Soviet prosecutors caused similar difficulties, leading to intervention by the Tribunal on two occasions:

The President: Colonel Pokrovsky, ... I have interrupted all the other prosecutors to point out to them that one opening speech had been made on behalf of their delegation, and that really their function was to present the documents. ... You have just presented a document which states that three volunteers were shot. I think that any comment upon that is really unnecessary.<sup>68</sup>

...

The President: Colonel Smirnov ... we really don't want any comment upon each one of these documents. The passage you have just read to us now is nothing but comment upon the frightful document which you have just read. It all takes time. If you could find your way to cut out the comment after these documents and simply to present us with the documents, it will save time.<sup>69</sup>

The charter did not provide for any opening statement or address by counsel for the defendants, who were confined to calling witnesses and closing addresses. The 'opening statements' by a large number of prosecuting counsel lengthened the trial considerably. More importantly, they left the clear impression that the Tribunal's attitude to prosecution and defence counsel was not even-handed. However, the denial of the usual right of counsel for an accused to make an 'opening statement' was the consequence of the provisions of the Charter. The provisions were unfair.

## THE TRIBUNAL AND THE PRESS

It was indicative of the high standard of professional propriety on the part of defence counsel, as well as of the readiness of the Tribunal to criticise the German Press, that on the 74th day of the trial, 5 March 1946, the President made a prepared statement in defence of Dr. Marx, counsel for the defendant Streicher. The statement fully defended the manner in which Dr. Marx had discharged his professional obligations.<sup>70</sup>

## REFERENCES TO WRITTEN NOTES

On 8 March 1946 the President said:<sup>71</sup>

... The Tribunal has received an application from Dr. Nelte, counsel for the defendant Keitel, inquiring whether a defendant, in order to support his memory, may make use of written notes while giving oral evidence. The Tribunal sanctions the use of written notes by a defendant in those circumstances, unless in special cases the Tribunal orders otherwise.

This was a magnanimous concession, as it was not subject to the usual qualifications in English law that such notes may only be used if the memory of a witness is exhausted and that they must have been made at or about the relevant time.

Later, during the evidence of a witness for the defendant Goering, this concession was extended to witnesses. The President said:<sup>72</sup>

The Tribunal has observed that the witness is using notes whilst giving evidence. The ruling which I announced this morning was confined to the defendants and did not extend to witnesses. Nevertheless, the Tribunal will allow the same rule to be applied to witnesses. But the evidence must not be read, the purpose of the rule being merely to assist recollection in giving evidence.

## WITNESSES FOR AND DOCUMENTS TENDERED BY DEFENDANTS

Before the presentation of the cases for the defendants began, the Tribunal heard submissions by all defence counsel relating to the witnesses whom it was sought to call and the documents which it was desired should be tendered. This process occupied several sitting days and was carried out with meticulous care on the part of the Tribunal, which showed little sign of impatience.

Tedious though this procedure was, it undoubtedly led to the shortening of the length of the trial because in many cases it was agreed by counsel that, instead of calling a witness in person--often from a distant place--an affidavit would suffice or interrogatories would be administered. It is true that, by the procedure, the prosecution was able to obtain a more comprehensive overview of the totality of the defence cases than would normally be possible, but there was no objection by defence counsel.

## CONCLUSION

It has been acknowledged--and certainly there has been an absence of significant criticism--that the Nuremberg trial was generally conducted fairly and justly, taking into account the terms of the London Agreement and Charter. The analysis in this chapter confirms that assessment.

The hearing of evidence, submissions and addresses and the delivery of the Judgment occupied 218 days, from 20 November 1945 to 1 October 1946, when the reading of the Judgment was completed. The transcript of the proceedings covered 22 volumes. In addition there were numerous 'closed' sessions, of which no official transcript is available. The transcript contained in the 22 volumes was translated into four languages. A total of 18 volumes of documents also were formally tendered in evidence.

The burden on the four judges and their alternates was heavy in the extreme, but throughout decorum was observed and the letter and spirit of a 'fair trial' in the terms of the London Agreement and Charter generally prevailed.

Although attention has been directed in this chapter and in Appendix I to some instances of procedural or evidential unfairness, in the author's opinion, in relation to particular matters and some individual defendants, an overall perspective of the transcript impels a conclusion that the conduct of the trial was nevertheless essentially 'fair' in the forensic sense of that word. Much of the credit for this achievement clearly belonged to the President of the Tribunal, Lord Justice Lawrence, whose firm hand and, with few exceptions, even judicial temperament combined to present a portrait of a tribunal which was determined that not only should justice be done but that, in the time-honoured words of English law, it should manifestly be seen to be done.

One should not omit a reference in the context of this chapter to the professional conduct of German counsel for the accused. They were, for the most part, contending with a mass of factual material and authentic documents

which not only proved the guilt of their clients but also betokened cruelty, depravity and inhumanity on a scale unprecedented in the history of mankind. They strived resourcefully, albeit for the most part unsuccessfully. They were not familiar with the basic forensic setting; there were language difficulties; the stern voices of the Soviet prosecutors and, at times, the arrogance of American counsel were forbidding. Despite all this, their manner of representation of their clients could only have enhanced their professional standing. Is there a recorded speech by defence counsel in modern times which surpasses in brilliance that of Dr. Stahmer, counsel for Goering? I doubt it.<sup>73</sup>



## NOTES

1. Nazi Conspiracy and Aggression, vol. 1, p. 85, Office of United States Chief of Counsel for Prosecution of Axis Criminality, United States Government Printing Office, Washington, 1946. This eight volume series is a collection of documentary evidence and guide materials prepared by the American and British prosecuting staffs for presentation before the International Military Tribunal at Nuremberg. The documents consist, in the main, of official papers found in archives of the German Government and Nazi Party, diaries and letters of prominent Germans, and captured reports and orders (vol. 1, preface, pp. vi to vii). The collection relates only to Counts 1 and 2. At the time of its publication, 20 January 1946, the French prosecution case had just commenced and it was not expected the Soviet case would be reached for several weeks (vol. 1, preface, p. ix). In the preface it was stated that '... one of the objects of this undertaking is to acquaint the American public at the earliest opportunity with the character of the evidence produced by its representatives'. More than eight months remained before judgment would be delivered.
2. Ibid., p. 86.
3. Ibid., p. 37.
4. Ibid., p. 87.
5. Nuremberg Trial, I.M.T., vol. II, p. 1.
6. Ibid., p. 9.
7. Ibid., p. 9.
8. Ibid., p. 10.
9. Nazi Conspiracy and Aggression, loc. cit., vol. 1, p. 92.
10. Idem.
11. Idem.
12. Ibid., p. 94.
13. Historians have differed about the fate of Bormann. For example, Jochen von Lang, a well-known German magazine editor, in his book The Secretary, published in 1979, asserted that there was clear proof, based on dental evidence, that Bormann committed suicide on 2 May 1945. On the contrary, former war correspondent Paul Manning, in Martin Bormann - Nazi in Exile, claimed that Bormann escaped to South America, became an intimate of, and adviser to, the Argentine dictator, Juan Peron, and in 1981 was still alive.
14. Nuremberg Trial, I.M.T., vol. II, p. 26.
15. Ibid., p. 156.
16. Nazi Conspiracy and Aggression, op. cit., vol. 1, p. 97.
17. Ibid., p. 96.
18. Ibid., p. 22.
19. Idem.

20. Smith, Reaching Judgment at Nuremberg, *op. cit.*, pp. 186-189.
21. Nuremberg Trial, I.M.T., vol. II, p. 22.
22. Idem.
23. Ibid., p. 156.
- 23a Nazi Conspiracy, and Aggression, *op. cit.*, pp. 97-113; Nuremberg Trial I.M.T., vol. I, pp. 155-166.
24. I.M.T. Judgment, pp. 87-88.
25. Nazi Conspiracy and Aggression, *op. cit.*, vol. I, pp. 155-156.
26. Ibid., pp. 157-158.
27. Ibid., pp. 159-165.
28. Ibid., pp. 105-108.
29. Ibid., p. 108.
30. Ibid., pp. 109-111.
31. The argument on behalf of Hess and the submissions of counsel were heard by the Tribunal at the end of the session on 30 November in the presence only of Hess. They are recorded in the transcript, vol. II, at pp. 478-496.
32. Nazi Conspiracy and Aggression, *op. cit.*, p. 113.
33. Idem.
34. Nuremberg Trial, I.M.T., vol. I., p. 166 .
35. Ibid., pp . 166-7 . Dr . Gilbert's report read:
  1. In compliance with the Tribunal's request, the following facts and studied opinions are submitted with respect to the competence of Rudolf Hess, based on my continual tests and observations from October 1945 to the present time, in the capacity of prison psychologist:
  2. Amnesia at beginning of trial. There can be no doubt that Hess was in a state of virtually complete amnesia at the beginning of the trial. The opinions of the psychiatric commissions in this regard and with respect to his sanity have only been substantiated by prolonged subsequent observation.
  3. Recovery. On the day of the special hearing in his case, 30 November 1945, Rudolf Hess did, in fact, recover his memory. The cause of his sudden recovery is an academic question, but the following event probably played a part: Just before the hearing I told Hess (as a challenge) that he might be considered incompetent at that time and excluded from the proceedings, but I would sometimes see him in his cell. Hess seemed startled and said he thought he was competent. Then he gave his declaration of malingering in court, apparently as a face-saving device. In later conversations he admitted to me that he had not been malingering, and that he knew he had lost his memory twice in England. During the months of December 1945, and January 1946, his memory was quite in order.
  4. Relapse. At the end of January I began to notice the beginnings of memory failure. This increased progressively during February, until he returned to a state of virtually complete amnesia again about

the beginning of March, and he has remained in that state ever since. (At the beginning of relapse, Hess expressed anxiety over it, saying that no one would believe him this time after he had said he had faked his amnesia the first time). The amnesia is progressive, each day's events being quickly forgotten. At present his memory span is about one-half day, and his apprehension span has dropped from 7 to 4 digits repeated correctly immediately after hearing.

5. Competence and sanity. I have read the application of Dr. Seidl both in German and English, and wish to make the following comment:

- a. Lay discussion of psychiatric concepts does not help throw any light on this case, because psychiatrists themselves are not in agreement on the definition of terms like 'psychopathic constitution', 'hysterical reaction', etc., and these terms have entirely different meanings in English and German usage.
- b. The psychiatric commissions have agreed, and my further observations have confirmed, that Hess is not insane (in the legal sense of being incapable of distinguishing right from wrong or realizing the consequences of his acts).
- c. Hess did recover his memory for a sufficient period of time (2-3 months) to give his counsel ample cooperation in the preparation of his defense. If he failed to do so, it was the result of a negativistic personality peculiarity, which I have also observed, and not incompetence.
- d. There has been no indication in his case history or present behaviour that he was insane at the time of the activities for which he has been indicted. His behaviour throughout the trial has also shown sufficient insight and reason to dispel any doubts about his sanity. (He may have gone through a psychotic episode in England, but that in no way destroys the validity of the previous two statements. He has exhibited signs of a 'persecution complex' here too, but these have not been of psychotic proportions).
- e. In my opinion, another examination by a psychiatric commission at this time would not throw any further light on the case, because the clinical picture is the same and the conclusions would necessarily be the same as those of the original psychiatric commissions, to wit: Hess is not insane but suffering from hysterical amnesia. I have discussed this case with the present prison psychiatrist, Lt. Col. Dunn, who has recently examined Hess, and he is also of the opinion that Hess's present mental state is apparently the same as that indicated in the original psychiatric reports, which he has read.

36. Nuremberg Trial, I.M.T., vol. II, pp. 156-157.

37. Ibid., p. 160.

38. Ibid., p. 191.

39. Ibid., p. 204.

40. Ibid., pp. 255-256.

41. Ibid., p. 293.

42. Ibid., p. 365.

43. Ibid., p. 385.

44. For example, see Nuremberg Trial, I.M.T., vol. VI, pp. 80-81.

45. Nuremberg Trial, I.M.T., vol. III, pp. 31-32, p. 33.

46. Ibid., p. 209.
47. Ibid., p 247.
48. Idem.
49. Ibid., pp. 400-402.
50. Ibid., p. 536.
51. Ibid., p. 558.
52. Ibid., pp. 425-427.
53. Ibid., pp. 597-601.
54. Ibid., p. 599.
55. Nuremberg Trial, I.M.T., vol. IV, p. 2.
56. Idem.
57. Nuremberg Trial, I.M.T., vol. V., pp. 81-82.
58. Ibid., p. 132.
59. Ibid., p. 133.
60. Nuremberg Trial, I.M.T., vol. IV, p. 498.
61. Ibid., pp. 503-504.
62. Ibid., p. 504.
- 62a. Nuremberg Trial, I.M.T., vol. VI., p. 321.
63. Ibid., pp. 338-339.
64. Ibid., pp. 418-460, pp. 467-488, pp. 499-533, pp. 554-566; vol, VII, pp. 3-9, pp. 23-25.
65. Nuremberg Trial, I.M.T., vol. VII, p. 25.
66. Ibid., pp. 72-104.
67. Ibid., p. 86.
68. Ibid., p. 429.
69. Ibid., p. 448.
70. Nuremberg Trial, I.M.T., vol. VIII, pp. 532-533. The statement was:

The attention of the Tribunal has been drawn by Dr. Marx, one of the German counsel appearing in this case for the Defense, to an article which was published in the newspaper Berlinger Zeitung for February 2, under the heading 'A Defense Counsel'. The article, which I do not propose to read, criticizes Dr. Marx in

the severest terms for an error in his cross-examination of a witness when he deputized for Dr. Babel on behalf of the SS. The article suggested that in asking the question he did he was behaving most improperly, that he was expressing private and personal views under the guise of acting as counsel, and that his proper course was to remain silent in view of the character of the evidence.

The matter assumes a graver aspect still because the article goes on to threaten Dr. Marx with complete ostracism in the future and does so in language both violent and intimidating.

The Tribunal desires to say in the plainest language that such conduct cannot be tolerated. The right of any accused person to be represented by counsel is one of the most important elements in the administration of justice. Counsel is an officer of the Court, and he must be permitted freely to make his defense without fear from threats or intimidation. In conformity with the express provisions of the Charter, the Tribunal was at great pains to see that all the individual defendants and the named organizations should have the advantage of being represented by counsel, and the Defense Counsel have already shown the great service they are rendering in this Trial, and their conduct in this regard should certainly not leave them open to reproach of any kind from any quarter.

The Tribunal itself is the sole judge of what is proper conduct in Court and will be zealous to insure that the highest standard of professional conduct is maintained. Counsel, in discharge of their duties under the Charter, may count upon the fullest protection which it is in the power of the Tribunal to afford. In the present instance the Tribunal does not think that Dr. Marx in any way exceeded his professional duty.

The Tribunal regards the matter as one of such importance in its bearing on the due administration of justice that they have asked the Control Council for Germany to investigate the facts and to report to the Tribunal.

71. Nuremberg Trial, I.M.T., vol IX, p. 1.
72. Ibid., p. 13.
73. Nuremberg Trial, I.M.T., vol. XVII, pp. 497-550.

## ANNEXE 1 TO CHAPTER 10

## RULES OF PROCEDURE

(Adopted 29 October 1945)

**Rule 1. Authority to Promulgate Rules**

The present Rules of Procedure of the International Military Tribunal for the trial of the major war criminals (hereinafter called "the Tribunal") as established by the Charter of the Tribunal dated 8 August 1945 (hereinafter called "the Charter") are hereby promulgated by the Tribunal in accordance with the provisions of Article 13 of the Charter.

**Rule 2. Notice to Defendants and Right to Assistance of Counsel**

(a) Each individual defendant in custody shall receive not less than 30 days before trial a copy, translated into a language which he understands, (1) of the Indictment, (2) of the Charter, (3) of any other documents lodged with the Indictment, and (4) of a statement of his right to the assistance of counsel as set forth in sub-paragraph (d) of this Rule, together with a list of counsel. He shall also receive copies of such rules of procedure as may be adopted by the Tribunal from time to time.

(b) Any individual defendant not in custody shall be informed of the indictment against him and of his right to receive the documents specified in sub-paragraph (a) above, by notice in such form and manner as the Tribunal may prescribe.

(c) With respect to any group or organization as to which the Prosecution indicates its intention to request a finding of criminality by the Tribunal, notice shall be given by publication in such form and manner as the Tribunal may prescribe and such publication shall include a declaration by the Tribunal that all members of the named groups or organizations are entitled to apply to the Tribunal for leave to be heard in accordance with the provisions of Article 9 of the Charter. Nothing herein contained shall be construed to confer immunity of any kind upon such members of said groups or organizations as may appear in answer to the said declaration.

(d) Each defendant has the right to conduct his own defense or to have the assistance of counsel. Application for particular counsel shall be filed at once with the General Secretary of the Tribunal at the Palace of Justice, Nuremberg, Germany. The Tribunal will designate counsel for any defendant who fails to apply for particular counsel, or where particular counsel requested is not within ten (10) days to be found or available; unless the defendant elects in writing to conduct his own defense. If a defendant has requested particular counsel who is not immediately to be found or available, such counsel or a counsel of substitute choice may, if found and available before trial, be associated with or substituted for counsel designated by the Tribunal, provided that (1) only one counsel shall be permitted to appear at the trial for any defendant, unless by special permission of the Tribunal, and (2) no delay of trial will be allowed for making such substitution or association.

**Rule 3. Service of Additional Documents**

If before the trial, the Chief Prosecutors offer amendments or additions to the Indictment, such amendments or additions, including any accompanying documents shall be lodged with the Tribunal and copies of the same, translated into a language which they each understand, shall be furnished to the defendants in custody as soon as practicable and notice given in accordance with Rule 2 (b) to those not in custody.

#### **Rule 4. Production of Evidence for the Defense**

(a) The Defense may apply to the Tribunal for the production of witnesses or of documents by written application to the General Secretary of the Tribunal. The application shall state where the witness or document is thought to be located, together with a statement of their last known location. It shall also state the facts proposed to be proved by the witness or the document and the reasons why such facts are relevant to the Defense.

(b) If the witness or the document is not within the area controlled by the occupation authorities, the Tribunal may request the Signatory and adhering Governments to arrange for the production, if possible, of any such witnesses and any such documents as the Tribunal may deem necessary to proper presentation of the Defense.

(c) If the witness or the document is within the area controlled by the occupation authorities, the General Secretary shall, if the Tribunal is not in session, communicate the application to the Chief Prosecutors and, if they make no objection, the General Secretary shall issue a summons for the attendance of such witness or the production of such documents, informing the Tribunal of the action taken. If any Chief Prosecutor objects to the issuance of a summons, or if the Tribunal is in session, the General Secretary shall submit the application to the Tribunal, which shall decide whether or not the summons shall issue.

(d) A summons shall be served in such manner as may be provided by the appropriate occupation authority to ensure its enforcement and the General Secretary shall inform the Tribunal of the steps taken.

(e) Upon application to the General Secretary of the Tribunal, a defendant shall be furnished with a copy, translated into a language which he understands, of all documents referred to in the Indictment so far as they may be made available by the Chief Prosecutors and shall be allowed to inspect copies of such documents as are not so available.

#### **Rule 5. Order at the Trial**

In conformity with the provisions of Article 18 of the Charter, and the disciplinary powers therein set out, the Tribunal, acting through its President, shall provide for the maintenance of order at the Trial. Any defendant or any other person may be excluded from open sessions of the Tribunal for failure to observe and respect the directives and dignity of the Tribunal.

#### **Rule 6. Oaths; Witnesses**

(a) Before testifying before the Tribunal, each witness shall make such oath or declaration as is customary in his own country.

(b) Witnesses while not giving evidence shall not be present in court. The President of the Tribunal shall direct, as circumstances demand, that witnesses shall not confer among themselves before giving evidence.

#### **Rule 7. Applications and Motions before Trial and Rulings during the Trial**

(a) All motions, applications or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal at the Palace of Justice, Nuremberg, Germany.

(b) Any such motion, application or other request shall be communicated by the General Secretary of the Tribunal to the Chief Prosecutors and, if they make no objection, the President of the Tribunal may make the appropriate order on behalf of the Tribunal. If any Chief Prosecutor objects, the President may call a special

session of the Tribunal for the determination of the question raised.

(c) The Tribunal, acting through its President, will rule in court upon all questions arising during the trial, such as questions as to admissibility of evidence offered during the trial, recesses, and motions; and before so ruling the Tribunal may, when necessary, order the closing or clearing of the Tribunal or take any other steps which to the Tribunal seem just.

#### **Rule 8. Secretariat of the Tribunal**

(a) The Secretariat of the Tribunal shall be composed of a General Secretary, four Secretaries and their Assistants. The Tribunal shall appoint the General Secretary and each Member shall appoint one Secretary. The General Secretary shall appoint such clerks, interpreters, stenographers, ushers, and all such other persons as may be authorized by the Tribunal and each Secretary may appoint such assistants as may be authorized by the Member of the Tribunal by whom he was appointed.

(b) The General Secretary, in consultation with the Secretaries, shall organize and direct the work of the Secretariat, subject to the approval of the Tribunal in the event of a disagreement by any Secretary.

(c) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its Members, and perform such other duties as may be designated by the Tribunal.

(d) Communications addressed to the Tribunal shall be delivered to the General Secretary.

#### **Rule 9. Record, Exhibits, and Documents**

(a) A stenographic record shall be maintained of all oral proceedings. Exhibits will be suitably identified and marked with consecutive numbers. All exhibits and transcripts of the proceedings and all documents lodged with and produced to the Tribunal will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

(b) The term "official documents" as used in Article 25 of the Charter includes the Indictment, rules, written motions, orders that are reduced to writing, findings, and judgments of the Tribunal. These shall be in the English, French, Russian, and German languages. Documentary evidence or exhibits may be received in the language of the document, but a translation thereof into German shall be made available to the defendants.

(c) All exhibits and transcripts of proceedings, all documents lodged with and produced to the Tribunal and all official acts and documents of the Tribunal may be certified by the General Secretary of the Tribunal to any Government or to any other tribunal or wherever it is appropriate that copies of such documents or representations as to such acts should be supplied upon a proper request.

#### **Rule 10. Withdrawal of Exhibits and Documents**

In cases where original documents are submitted by the Prosecution or the Defense as evidence, and upon a showing (a) that because of historical interest or for any other reason one of the Governments signatory to the Four Power Agreement of 8 August 1945, or any other Government having received the consent of said four Signatory Powers, desires to withdraw from the records of the Tribunal and preserve any particular original documents and (b) that no substantial injustice will result, the Tribunal shall permit photostatic copies of said original documents, certified by the General Secretary of the Tribunal, to be substituted for the originals in the records of the Court and shall deliver said original documents to the applicants.



# **Rule 11. Effective Date and Powers of Amendment and Addition**

These Rules shall take effect upon their approval by the Tribunal. Nothing herein contained shall be construed to prevent the Tribunal from, at any time, in the interest of fair and expeditious trials, departing from, amending, or adding to these Rules, either by general rules or special orders for particular cases, in such form and upon such notice as may appear just to the Tribunal.

## **ANNEXE II TO CHAPTER 10**

### **OPENING STATEMENT**

(20 November 1945)

THE PRESIDENT: Before the defendants in this case are called upon to make their pleas to the Indictment which has been lodged against them, and in which they are charged with Crimes against Peace, War Crimes, and Crimes against Humanity, and with a Common Plan or Conspiracy to commit those crimes, it is the wish of the Tribunal that I should make a very brief statement on behalf of the Tribunal.

The International Military Tribunal has been established pursuant to the Agreement of London, dated the 8th of August 1945, and the Charter of the Tribunal as annexed thereto, and the purpose for which the Tribunal has been established is stated in Article 1 of the Charter to be the just and prompt trial and punishment of the major war criminals of the European Axis.

The Signatories to the Agreement and Charter are the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic, and the Government of the Union of Soviet Socialist Republics.

The Committee of the Chief Prosecutors, appointed by the four Signatories, have settled the final designation of the war criminals to be tried by the Tribunal, and have approved the Indictment on which the present defendants stand charged here today.

On Thursday, the 18th of October 1945, in Berlin, the Indictment was lodged with the Tribunal and a copy of that Indictment in the German language has been furnished to each defendant, and has been in his possession for more than 30 days.

All the defendants are represented by counsel. In almost all cases the counsel appearing for the defendants have been chosen by the defendants themselves, but in cases where counsel could not be obtained the Tribunal has itself selected suitable counsel agreeable to the defendant.

The Tribunal has heard with great satisfaction of the steps which have been taken by the Chief Prosecutors to make available to defending counsel the numerous documents upon which the Prosecution rely, with the aim of giving to the defendants every possibility for a just defense.

The Trial which is now about to begin is unique in the history of the jurisprudence of the world and it is of supreme importance to millions of people all over the globe. For these reasons, there is laid upon everybody who takes any part in this Trial a solemn responsibility to discharge their duties without fear or favor, in accordance with the sacred principles of law and justice.

The four Signatories having invoked the judicial process, it is the duty of all concerned to see that the Trial in no way departs from those principles and traditions which alone give justice its authority and the place it ought to occupy in the affairs of all civilized states.

This Trial is a public Trial in the fullest sense of those words, and I must, therefore, remind the public that the Tribunal will insist upon the complete maintenance of order and decorum, and will take the strictest measures to

enforce it. It only remains for me to direct, in accordance with the provisions of the Charter, that the Indictment shall now be read.

## APPENDIX I      PROCEDURAL AND EVIDENTIAL FAIRNESS:      INDIVIDUAL ACCUSED AND THE INDICTED ORGANISATIONS

This appendix contains comments on questions of procedural and evidential fairness in relation to most of the individual defendants and the 'indicted' organisations. The comments are by no means exhaustive and are confined to the principal matters which appear relevant in the light of the transcript of the trial. They are designed to present an overview of the manner in which the trial was conducted, independently of the question of the Tribunal's jurisdiction in a strictly legal sense.

Even though there was, of course, no jury at Nuremberg, the manner in which a defendant and his counsel are treated by a court or tribunal is a critical factor in the attainment of justice. It is not suggested that any of the rulings or decisions in relation to procedure or evidence which are criticised in the appendix would, if they had been given in favour of individuals, have led to different verdicts or sentences. My views are expressed, as a trial lawyer, in order to give a more complete picture of 'Nuremberg justice' than is projected by the writings of many jurists and authors.

The appendix does not contain any references to Streicher, Raeder or Seyss-Inquart, as individual accused, because in their cases the transcript does not reveal any instances of procedural or evidential unfairness.

### 1. Goering

Obviously, the defendant Goering was the principal Nazi among the defendants. He began his evidence early in the afternoon of 13 March 1946. His evidence-in-chief, in answer to questions by his counsel, continued throughout 14 and 15 March; it extended for a very short time into 16 March. Throughout this period, Goering was heard virtually without any interruption from the Tribunal. Most of his answers to questions by his counsel were extremely lengthy—in some cases their transcription covered many pages, at times nearly 10.

Mr. Justice Jackson was the only prosecutor who objected to the admissibility of any of Goering's evidence-in-chief. The objection was over-ruled.<sup>1</sup>

For most of the remainder of the sessions on 16 March and for part of the sessions on 18 March, other defence counsel examined or cross-examined Goering. The Tribunal seldom interrupted.

The cross-examination of Goering by Mr. Justice Jackson began before the luncheon adjournment on 18 March. It was interrupted following an arrangement among counsel that a witness for Goering be interposed. He was Birger Dahlerus who was extensively questioned by many counsel.

Mr. Justice Jackson resumed his cross-examination late on the afternoon of 19 March. It continued for almost the whole of the sessions on 20 March. For the most part it was acerbic and at times petulant. It was not of the professional standard which characterises the forensic methods of prosecution counsel in major criminal cases in the highest English and Australian courts. It was in marked contrast to the quality of the much briefer cross-examination (148 pages of transcript) by Sir David Maxwell-Fyfe (Britain) and of the Chief U.S.S.R. prosecutor, General Rudenko. The Chief Prosecutor for the French Republic did not cross-examine Goering, who was briefly re-examined.

A consideration of the transcript of the evidence of Goering, given over a period of several days, demonstrates the all-pervading tolerance, patience and judicial fairness shown generally by the Tribunal. The typical attitude of the Tribunal is probably best illustrated by the following remark of the President near the end of Goering's re-examination:<sup>2</sup>

The Tribunal would wish that you should not make speeches ... we have already heard you say that more than once and we do not wish to hear it again.

When the principal evidence of Goering had been completed, there was lengthy legal argument concerning the right of defence counsel to read extracts from documents submitted in evidence to the Tribunal as the 'Document Book' of a particular defendant. Mr. Justice Jackson objected to this course. The answering arguments of defence counsel were extremely cogent.<sup>3</sup>

The ruling of the Tribunal in the following terms was typically fair:<sup>4</sup>

In considering the matters which have been raised this morning, the Tribunal has had in mind the necessity for a fair trial and at the same time for an expeditious trial, and the Tribunal has decided that for the present it will proceed under rules heretofore announced, that is to say:

First, documents translated into the four languages may be introduced without being read but in introducing them counsel may summarize them, or otherwise call their relevance to the attention of the Court, and may read such brief passages as are strictly relevant and are deemed important.

Second, when a document is offered, the Tribunal will hear any objections that may be offered to it and in this collection, I would refer to the rule which the Tribunal made on the 8th of March 1946, which reads as follows:

To avoid unnecessary translations, Defense Counsel shall indicate to the Prosecution the exact passages in all documents which they propose to use in order that the Prosecution may have an opportunity to object to irrelevant passages. In the event of disagreement between the Prosecution and the Defense as to the relevancy of any particular passage, the Tribunal will decide what passages are sufficiently relevant to be translated. Only the cited passages need to be translated, unless the Prosecution requires the translation of the entire document.

The Tribunal has allowed the Defendant Goering, who has given evidence first of the defendants and who has proclaimed himself to be responsible as the second leader of Nazi Germany, to give his evidence without any interruption whatever, and he has covered the whole history of the Nazi regime from its inception to the defeat of Germany.

The Tribunal does not propose to allow any of the other defendants to go over the same ground in their evidence except insofar as it is necessary for their own defense.

Defence Counsel are advised that the Tribunal will not ordinarily regard as competent evidence, extracts from books or articles expressing the opinions of particular authors on matters of ethics, history, or particular events.

## 2. Hess

One matter of interest which arose during the presentation of the case for the defendant Hess, which is analogous to the ruling in the last paragraph of the extract cited above, was the argument of counsel that the Versailles Treaty was signed by Germany under duress and therefore was not binding on Germany as a state. The ruling of the Tribunal was:

The Tribunal rules that evidence as to the injustice of the Versailles Treaty or whether it was made under duress is inadmissible and it therefore rejects Volume 3 of the documents on behalf of the defendant Hess.

There can be no doubt that this ruling was legally correct. Any challenge to the effect of the Treaty of Versailles would have required much more cogent evidence than was proposed: the mere opinions of individuals could not have been admissible on any basis.

It is noteworthy that the defendant Hess disputed the jurisdictional competence of the Tribunal and did not give evidence. The principal presentation of his case occupied only 90 pages of transcript.

Hess was in all respects treated fairly.

### 3. Von Ribbentrop

Throughout his cross-examination of the accused von Ribbentrop, Col. Amen, American Associate Trial Counsel, was aggressive and bullying.<sup>5</sup> The Tribunal did not rebuke counsel so far as his manner was concerned, but the President did say:<sup>6</sup>

... The Tribunal has already heard a very long cross-examination of the defendant, and they think that this is not adding very much to what they have already heard. The Defendant has given very similar evidence already.

### 4. Keitel

Keitel was an articulate witness, but was cross-examined with devastating effect by Sir David Maxwell-Fyfe.<sup>7</sup> The accused was treated fairly.

### 5. Kaltenbrunner

Kaltenbrunner was indicted on Counts 1, 3 and 4. The allegations in the indictment against him were vague, general and lacked particularity. He defended himself with spirit, but also with dignity.

His evidence-in-chief was given with precision and as much supporting detail as he was allowed to state.

His cross-examination by American counsel lacked the force and effect of that of Sir David Maxwell-Fyfe in other cases. Counsel frequently interrupted the responses to his questions, but the Tribunal seldom prevented this abuse of authority by prosecuting counsel.

Kaltenbrunner complained at one point<sup>8</sup> that 'surprise affidavits' were being used against him in cross-examination--that is, affidavits which had not been previously tendered in evidence and which he had not previously seen. The Tribunal remained silent on the protest. Nevertheless, Kaltenbrunner, as soon as he was allowed, gave strongly expressed responses to the affidavits (which technically were answers to cross-interrogatories administered to two senior German Government officers who had previously answered interrogatories administered by counsel for the accused).

### 6. Rosenberg

The Tribunal allowed much more licence in cross-examination of Rosenberg by prosecution counsel than it accorded to the defendant in answering questions.<sup>9</sup> There was technically no procedural unfairness. However, the closing address of Counsel, Dr. Thoma, was curtailed by pressure from the Tribunal. The President said:<sup>10</sup> 'The Tribunal would like you to finish your speech [which occupied only 59 pages of transcript] before lunch, if you could possibly summarize some parts of it. I don't know whether that is possible. ... All the speech will be taken as being presented to the Tribunal ... the Tribunal will take note of it all.' Thereupon, Counsel omitted a substantial part of his address. The manner of expression of the pressure to do so would have been cold comfort to counsel and to Rosenberg, who had been indicted on all four Counts. In the result, he was convicted as charged and sentenced to death.

### 7. Frank

The examination-in-chief of Frank was very brief. He gave his evidence with clarity and confidence. There were

virtually no interruptions by the Tribunal. Including cross-examination, his evidence occupied only 43 pages of transcript.

The strongest evidence against Frank was contained in the 42 volumes of his diary, which he voluntarily gave to the authorities after he had been taken into custody. Clearly, they were admissible.

Frank appears to have been an impressive witness - dignified and not loquacious. The whole of his evidence was marked by a lack of acrimony. American counsel played virtually no part.

In only two instances could it be suggested that the Tribunal was to some degree unfair in the case of Frank. It upheld prosecution objections to any reference by defence counsel to (a) the Potsdam Declaration on 2 August 1945, whereby a Council of Foreign Ministers was established to prepare a peace settlement which recognised the formation of a German national government; or (b) the establishment of 'concentration camps' in the American Occupation Zone after the capitulation of the Third Reich. The issue was not one of admissibility but of cogency, on which the Tribunal was in a position to make a judgment.

The references by counsel to (a) and (b) above were designed to support his arguments by analogy. With respect to (a), the Tribunal, without any prosecution objection, did not prevent counsel for the defendant Von Ribbentrop from referring at length to the Potsdam Declaration.<sup>11</sup>

In respect of both (a) and (b) above the Tribunal did not act in an even-handed manner.

## 8. Frick

During the defence case for the defendant Frick,<sup>12</sup> it became apparent that procedures adopted by the American prosecution prejudiced a number of the defendants. Frick, who was convicted on Counts 2, 3 and 4 and sentenced to death, did not give evidence. Documents were submitted on his behalf, and one witness only was called in his defence. The witness was Dr. Gisevius, a German Government civil servant, who became a Gestapo official in 1933. He later was an officer of the Ministry of the Interior and in this and other positions was in close touch with a number of the defendants. He took a prominent part in the planning of the so-called 'Rohm Purge' in 1934 and plots against Hitler personally, including the unsuccessful attempt on Hitler's life on 20 July 1944.

In his 'cross-examination' of Dr. Gisevius, the following questions were put to him by Mr. Justice Jackson:<sup>13</sup>

Question: The Tribunal perhaps should know your relations with the Prosecution. Is it not a fact that within 2 months of the surrender of Germany I met you at Wiesbaden, and you related to me your experiences in the conspiracy that you have related here [the plots to kill Hitler which originated in the German Army]?

Answer: Yes.

Question: And you were later brought here and after coming here were interrogated by the Prosecution as well as by the counsel for Frick and for Schacht?

Answer: Yes.

The fact that Mr. Justice Jackson interrogated Dr. Gisevius, and the consequences of his so doing, raise important procedural issues. Such interrogation of a person not a defendant, and the manner of its subsequent use by prosecution counsel when the person gave evidence for the defendant Frick, does not appear to have been justified by the provisions of the Charter, despite Article 24 (g). At least, the circumstances were such that the Tribunal had a discretion whether or not the 'cross examination' was admissible, but the discretion was not exercised. No reason was advanced as to why the Prosecution did not itself call Dr. Gisevius as a witness.

When Mr. Justice Jackson 'cross-examined' Dr. Gisevius, it can be inferred from the details in the questions that

he used information gained during that interrogation with devastating effect against a number of the defendants, especially Frick, Kaltenbrunner, Goering and Keitel, as well as the SA and the SS. A partial source of information for such 'cross-examination' may, however, have been a book which Dr. Gisevius had written. The 'cross-examination' reads like a classic examination-in-chief. When he had completed it, Mr. Justice Jackson said: 'I have concluded the examination'.<sup>14</sup>

Curious though this procedure would appear to trial counsel accustomed to western criminal practice and procedure, it is strange that even German counsel did not object to the 'cross-examination', which it was technically, but certainly not in substance; nor did the Tribunal intervene. Even more strange is the fact that none of the counsel for the three above-named defendants, other than Frick, each of whose case had been so prejudicially affected by the tactic, sought to cross-examine Dr. Gisevius in any respect, least of all as to whether any promises or inducements had been made, given or offered to him.

Unless expressly authorised by the Charter, such a tactic was improper. The Charter cannot, it is submitted, be construed as authorising it. Article 13 provided: 'The Tribunal shall draw up rules for its procedure. These rules shall not be inconsistent with the provisions of this Charter'. It is true that Article 15 was in the following terms:

The Chief Prosecutors shall individually, and acting in collaboration with one another, also undertake the following duties:

- (a) investigation, collection and production before or at the Trial of all necessary evidence,
- (b) ...
- (c) the preliminary examination of all necessary witnesses and of the Defendants,

....

If the American prosecution had wished to call Dr. Gisevius as a witness, it could have done so as part of the prosecution case, rather than rely on personal discussions between the defence witness and prosecuting counsel and the subsequent formal pre-trial interrogation. The word 'tactic' has been used because the 'cross examination' does not ring true.

One other aspect of the 'cross examination' of Dr. Gisevius was the extent to which hearsay evidence was admitted. This was authorised by Article 19 of the Charter, which the Tribunal interpreted liberally so far as the prosecution was concerned. For example, during the evidence of Dr. Gisevius the President said to counsel for the German General Staff and High Command:<sup>15</sup>

If you mean that the evidence is hearsay, that will be perfectly obvious to the Tribunal, and doesn't make the evidence inadmissible, and you will be able to cross-examine him later.

This was one of very many applications of Article 19 of the Charter in respect of hearsay evidence.

It is of note that the defendant Streicher, who began his evidence on the same day as Dr. Gisevius gave evidence, in an obvious reference to him, described him as a traitor. Mr. Justice Jackson intervened to protect Dr. Gisevius. The Tribunal rebuked Streicher for the use of the description 'traitor'.<sup>16</sup>

In other respects there was no procedural unfairness in the presentation of the defence case for Frick'. His counsel was not interrupted on any occasion.

## 9. Schacht

Schacht was indicted under Counts 1 and 2 and acquitted of each charge. The indictment alleged that between 1932 and 1945 Schacht was a member of the Nazi Party. This was proved to be incorrect.<sup>17</sup> The indictment also asserted that he was a member of the Reichstag. This allegation also was proved to be incorrect.<sup>18</sup> The indictment generally was confusing, as appears from the submissions of Schacht's counsel.<sup>19</sup>

The constant interruptions by Mr. Justice Jackson during the examination-in-chief of Schacht were unfair in view of the indictment and should not have been permitted, as frequently they were.

The cross-examination of Schacht by Mr. Justice Jackson was very long, tedious and repetitive. It was marked by interrogation which often consisted of multiple questions. On no occasion did the Tribunal intervene. Schacht was at all times the master and his evidence only revealed his innate strength of mind and character.<sup>20</sup> A disgruntled American Chief of Counsel concluded with the words 'I am through with him.' No doubt Mr. Justice Jackson, rather than the witness, was relieved.

In my opinion, Schacht should not have been indicted, as the evidence presented against him was tenuous. At least, at the end of the defence case for Schacht the prosecution should have abandoned the charges. But American stubbornness prevailed. The dissenting opinion of the Russian member of the Tribunal was unconvincing and ignored much of the undisputed, favourable evidence in Schacht's case.<sup>21</sup>

## 10. Funk

The conduct of the case against Funk provided an outstanding example of the art of fair advocacy. Funk was indicted under all four Counts. He took office as Minister of Economics and Plenipotentiary General for War Economy in early 1938 and as President of the Reichsbank in January 1939, succeeding Schacht in all positions. He was acquitted on Count 1, and found guilty under the other three Counts.

In examination-in-chief his responses were impressive, but his defence was destroyed when Mr. Dodd, Executive Trial Counsel, in cross-examination, produced an affidavit by Herr Puhl, Funk's assistant. It contained damaging evidence, which, if true, negated much of the evidence-in-chief of Funk.

Defence counsel objected to the use of the affidavit, without a copy of it in the German language having previously been made available to the defence. The Tribunal ruled that the affidavit was admissible. The ruling was clearly correct, especially as the Tribunal immediately adjourned until the next day, before the affidavit was used in cross-examination. There was no obligation on the prosecution to disclose its existence to the defence until it was produced before the Tribunal. The tactics of prosecution counsel were fair, especially as Herr Puhl was called as a witness for cross-examination.

## 11. Doenitz

The case against the defendant Doenitz proceeded on predictable lines, but two matters relevant to procedural fairness merit mention.

First, the Tribunal disallowed the use by prosecution counsel in the cross-examination of Doenitz of an unsworn letter written by the widow of a submarine commander under his command relating to an alleged order 'to fire at helpless seamen who were in distress in the water'. The ruling was correct and it was unfair for the prosecution to have attempted to use the letter.

Second, the attitude of the President of the Tribunal during the cross-examination of Admiral Wagner, the principal witness for Doenitz, cannot be supported. Admiral Wagner was, at the commencement of the war, head of the operational group in the operations section of the Naval Operations, Staff. He was asked by Colonel

Phillimore, junior counsel for the United Kingdom, if he approved of a 'Führer Order' of 18 October 1942, which, under his own signature, he passed on to naval commands. The Order concerned the treatment of naval prisoners of war captured by German forces. The transcript records the following evidence:<sup>22</sup>

Col. Phillimore: Did you approve of that order?

Wagner: I regretted that one had to resort to this order, but in the first paragraph the reasons for it are set forth so clearly that I had to recognize its justification.

Col. Phillimore: You knew what handing over to the SD meant, did you not? You knew that meant shooting?

Wagner: No, that could have meant a lot of things.

Col. Phillimore: What did you think it meant?

Wagner: It could have meant that the people were interrogated for the counter intelligence; it could have meant that they were to be kept imprisoned under more severe conditions, and finally it could have meant that they might be shot.

Col. Phillimore: But you had no doubt that it meant that they might be shot, had you?

Wagner: The possibility that they might be shot undoubtedly existed.

Col. Phillimore: Yes, and did that occur to you when you signed the order sending it on to commanders?

Wagner: I would like to refer to paragraph 1 of this order, where it ... [interruption]

Col. Phillimore: Do you mind answering the question? Did it occur to you that they might be shot when you signed the order sending it on to commanders?

Wagner: Yes, the possibility was clear to me.

Dr. Siemers [acting as counsel for Doenitz]: Mr. President, the witness was asked whether he approved of this order. I do not think that Colonel Phillimore can cut off the witness' answer by saying that he may not refer to Paragraph 1 of the order. I believe that Paragraph 1 of the order is of decisive importance for this witness ...

The President: You have an opportunity of re-examining the witness.

Dr. Siemers: Yes.

The President: Then why do you interrupt?

Dr. Siemers: Because Colonel Phillimore has interrupted the answer of the witness and I believe that even in cross-examination the answer of the witness must at least be heard.

The President: Well, the Tribunal does not agree with you.

The President's last statement in that extract does not appear correct or fair, especially since, in subsequent cross-examination on the same subject matter, Admiral Wagner was interrupted several times by prosecuting counsel and his answers to questions were cut short. The Tribunal did not intervene. A judge has a duty to do so in such circumstances.

## 12. Von Schirach

The procedural and general fairness of the conduct of the trial of von Schirach should be judged against the



background of the indictment against him.

His Party and other offices were thus described in the Tribunal's Judgment:

He joined the Nazi Party and the SA in 1925. In 1929 he became the Leader of the National Socialist Students Union. In 1931 he was made Reichs Youth Leader of the Nazi Party with control over all Nazi youth organisations including the Hitler Jugend. In 1933, after the Nazis had obtained control of the Government, von Schirach was made Leader of Youth in the German Reich, originally a position within the Ministry of the Interior, but, after 1st December, 1936, an office in the Reich Cabinet. In 1940, von Schirach resigned as head of the Hitler Jugend and Leader of Youth in the German Reich, but retained his position as Reichsleiter with control over Youth Education. In 1940 he was appointed Gauleiter of Vienna, Reichs Governor of Vienna, and Reichs Defence Commissioner for that territory ... As Reichs Defence Commissioner, he had control of the civilian war economy. As Reichs Governor he was head of the municipal administration of the city of Vienna, and, under the supervision of the Minister of the Interior, in charge of the governmental administration of the Reich in Vienna.

Von Schirach was indicted only under Counts 1 and 4. He was found not guilty on Count 1 but convicted under Count 4. The evidence admitted against him was wide-ranging and not confined by the Tribunal to the specific charges against him. The particulars alleged in the indictment were:

... he promoted the accession to power of the Nazi conspirators and the consolidation of their control over Germany set forth in Count One of the Indictment; he promoted the psychological and educational preparations for war and the militarization of Nazi dominated organizations set forth in Count One of the Indictment; and he authorized, directed and participated in the Crimes against Humanity set forth in Count Four of the Indictment including, particularly, anti-Jewish measures.

It is relevant to the procedural fairness, from an evidentiary viewpoint, of von Schirach's trial to note that the particulars in the indictment against him under Count 4 were in no way specific. However, Count 4 in essence involved both (a) the commission of crimes against humanity and the formulation and execution of a common plan or conspiracy to commit crimes against humanity as defined in Article 6(c) of the Charter; and (b) after a deviation in phraseology from crimes against humanity to war crimes (although von Schirach was not charged under Count 3), involvement in a common plan to commit war crimes.

Count 4, in the statement of the offence, was formally linked with Counts 1 and 3; on the former charge von Schirach was found not guilty, and he was not charged under Count 3. Nevertheless he was convicted under Count 4.

It is true that his counsel did not object to any of the evidence which led to his conviction on Count 4. Nevertheless, it is the duty of a criminal court or tribunal to be vigilant that the evidence against an accused person is, in accordance with the indictment, confined to the specific allegations: secundum allegata et probata.

In the judgment of the Tribunal, under the heading of 'Crimes against Peace', von Shirach was found not guilty of involvement in the development of Hitler's plan for territorial expansion by means of aggressive war and of having participated in the planning or preparation of any of the wars of aggression. However, in the judgment of the Tribunal<sup>23</sup> he was guilty of crimes against humanity, primarily because it was found that, as Gauleiter of Vienna, he participated in the deportation of Jews from Vienna. Although such a finding was open on the evidence, the fact that von Shirach was indicted only under Counts 1 and 4 required a strict limitation of the evidence against him to those two charges. Moreover, the indictment did not, as required by Article 16(a) of the Charter, 'include full particulars specifying in detail' the charges against him (emphasis added). In fact, there were only the most scanty particulars. The Tribunal was silent in respect of this deficiency.

In summary, von Schirach's evidence was presented against a vague background of particulars related to a 'rolled up' indictment and the cross-examination by the American prosecution exacerbated the damaging result .

The Tribunal also failed to ensure that the evidence admitted against him conformed to the indictment.

For these reasons, the conduct of the trial of von Schirach was not procedurally fair. No doubt his counsel should have submitted to the Tribunal that, to ensure fairness, the particulars in the indictment should have been amended, but there was no express provision in the Charter for amendment. Nevertheless, the provisions of Article 16(a) of the Charter were mandatory and explicit.

### 13. Sauckel

The accused Sauckel was charged, among other things, with having 'promoted the accession to power of the Nazi conspirators'. In his examination-in-chief he attempted to explain why, after a very humble upbringing, he joined the Nazi Party in 1923. But he was peremptorily cut short by the President of the Tribunal, as the following extract from the transcript shows: <sup>24</sup>

Dr. Servatius [counsel for Sauckel]: ... come back to the question of the Party.

Sauckel: This has to do with the question of the Party, for we must all give some reasons as to how we got there. I myself ... [interruption]

The President: ... I stated at the beginning of the defendant's case that we had heard this account from the defendant Goering and that we did not propose to hear it again from 20 defendants. It seems to me that we are having it inflicted upon us by nearly every one of the defendants.

Dr. Servatius: I believe, Mr. President, that we are interested in getting some sort of an impression of the defendant himself. Seen from various points of view, the facts look different. I will now briefly ... [interruption].

The President: It is quite true, Dr. Servatius, but we have had half an hour, almost, of it now.

Dr. Servatius: I shall limit it now.

Equally unfair, because it was not an issue raised in the indictment, in relation to Sauckel, was the following passage in the cross-examination of Sauckel by M. Herzog, Assistant Prosecutor for the French Republic: <sup>25</sup>

M. Herzog: Did you approve of Hitler's theory of living space?

Sauckel: The Fuhrer wrote about living space in his book. How far I agreed or disagreed with him cannot, in my opinion, be dealt with in this Trial, for I had no influence as to how the Fuhrer himself should interpret the word Lebensraum.

The President: The Tribunal think that you must answer the question, whether or not you approve of the doctrine of Lebensraum.

Sauckel: I am not fully acquainted with the statements made by the Fuhrer about the doctrine of Lebensraum. I should like to emphasize that I never thought of Lebensraum in connection with the carrying out of wars, or wars of aggression; neither did I promote the idea; but the idea of Lebensraum is perhaps best brought home to us by the fact that the population of Europe in the last 100 years has increased threefold, from 150 million to 450 million.

M. Herzog: Did you, or did you not approve of the theory of Lebensraum? Answer "Yes" or "No".

Sauckel: I did not agree with the theory of Lebensraum if it had to do with wars of aggression.

In cross-examination by Dr. Thoma, counsel for the defendant Rosenberg, Dr. Thoma said to Sauckel: <sup>26</sup>

Witness, the Delegate for the Four Year Plan gave you special powers concerning conscription in

dealings with all authorities and, in my opinion, it is not right that you should now deny these methods of recruitment and pass responsibility for them on to the Minister for the Occupied Eastern Territories.

Dr. Servatius then said: 'The defense counsel for Defendant Rosenberg may engage in cross-questioning, but it does not appear to me to be the right moment for him to make a speech of accusation against my client'.

The Tribunal remained silent, although it had frequently criticised virtually all defence counsel for making 'speeches' or comments in the course of their interrogation.

Mr. Biddle, the American member of the Tribunal, interrogated Sauckel at length (twenty one pages of transcript). Sauckel had already been cross-examined by four prosecution counsel. Mr. Biddle frequently misstated questions he had previously asked and interrupted the defendant in his answers. He demonstrated the truth of the dictum that 'the art of cross-examination is not to examine crossly'. His performance in what amounted to cross-examination was unprofessional as a lawyer and unjudicial in his office as a member of the Tribunal.

#### 14. Jodl

The case against the defendant Jodl is noteworthy for the extreme licence extended by the Tribunal to the principal cross-examining counsel--Leading Counsel for Great Britain, Mr. G.D. Roberts, K.C. He was a barrister of very wide experience. In the course of his cross-examination he frequently asked questions unrelated to the acts charged in the indictment against Jodl and of a political or legal character. Such matters, when a number of the accused had attempted to raise them, had been properly rejected by the Tribunal as not being admissible because they did not deal with factual evidence. The cross-examination by Mr. Roberts transgressed this ruling on many occasions.<sup>27</sup>

The cross-examination was lengthy (67 pages of transcript) and often 'cumulative', a word which was frequently used by the Tribunal in ruling that questions by defence counsel were inadmissible. Yet the Tribunal did not at any stage interrupt Mr. Roberts or attempt in any other way to prevent inadmissible questions being put to Jodl, whose trial does not appear to have been marked by even-handed procedural justice. However, he was found guilty on all four Counts, and it could not be argued that, on the admissible evidence, the verdicts were not justified.

The inanity of the questioning of Jodl by Mr. Biddle, the American member of the Tribunal, is demonstrated by an extract from the transcript.<sup>28</sup>

#### 15. Von Papen

The case of von Papen discloses instances of both substantive and procedural unfairness. He was indicted under Counts 1 and 2 only. The individual allegations against him were fragmentary and infelicitously drawn. They were:

... he promoted the accession to power of the Nazi conspirators and participated in the consolidation of their control over Germany set forth in Count One of the Indictment; he promoted the preparations for war set forth in Count One of the Indictment; and he participated in the political planning and preparation of the Nazi conspirators for Wars of Aggression and Wars in violation of International Treaties, Agreements and Assurances set forth in Counts One and Two of the Indictment.

Such particulars would not be regarded as adequate according to Anglo American criminal practice and procedure. In the event, von Papen was found not guilty under both Counts and discharged, although the Soviet, member of the Tribunal, Major General Nikitchenko, delivered a dissenting opinion.

The case against von Papen, as framed, failed to recognise the political situation involving the President of Germany, von Hindenburg, in the period preceding the accession to power of Hitler as Chancellor on 30 January 1933. Von Papen had been Chancellor of the Reich from 1 June 1932 until he was succeeded by von Schleicher

on 2 December 1932. As the majority judgment of the Tribunal records (pages 118-119):

Von Papen was active in 1932 and 1933 in helping Hitler to form the Coalition Cabinet and aided in his appointment as Chancellor on 30th January, 1933. As Vice-Chancellor in the Cabinet he participated in the Nazi consolidation of control in 1933. On 16th June, 1934, however, von Papen made a speech at Marburg which contained a denunciation of the Nazi attempts to suppress the free press and the church, of the existence of a reign of terror, and of '150 per cent Nazis' who were mistaking 'brutality for vitality'. On 30th June, 1934, in the wave of violence which accompanied the so-called Roehm Purge, von Papen was taken into custody by the SS, his office force was arrested, and two of his associates, including the man who had helped him work on the Marburg speech, were murdered. Von Papen was released on 3rd July, 1934.

The defects in the framing of the indictment against von Papen were reflected in the procedures adopted, with the acquiescence of the Tribunal, at his trial. Significantly, he was not as a witness restrained by the Tribunal in his responses, which generally were succinct and reasonably brief. It is clear from the transcript that in cross-examination he was the master of the situation. The cross-examination was conducted almost entirely by Sir David Maxwell-Fyfe, Deputy Chief Prosecutor for the United Kingdom, who completely failed to sheet home to the defendant the case alleged against him. The longer the cross-examination continued, the more the frustration of the cross-examiner became manifest. His questions became tedious and prolix, often occupying a page or more of transcript. The Tribunal had previously required all defendants to make short answers to questions and not 'speeches'. In no instance did the President of the Tribunal intervene to make a similar requirement of the cross-examiner in von Papen's case. Sir David Maxwell-Fyfe was reduced in the end to entering into a trivial dispute with von Papen about his use of the German personal pronoun 'du' in addressing a colleague, the Foreign Minister to Austria, Herr Schmidt. Von Papen caused the discontinuance of this cross-examination when he said:<sup>29</sup>

Sir David, if you had ever been in Austria in your life, you would know that in Austria almost everyone says 'Du' to everyone else, and to clear up this incident, may I add the following: On the day of our separation, when I left Austria, I said to Foreign Minister Schmidt, of whom I am very fond, 'Dear friend, we have worked together so much, now we can say "Du" to each other'.

From the viewpoint of procedural fairness, the Tribunal exhibited licence to Sir David Maxwell-Fyfe which it consistently denied to the defence. A typical instance is the following convoluted question put to von Papen without objection from the Tribunal:<sup>30</sup>

Sir David Maxwell-Fyfe: What I want to know is this. My question was: Who were the Leading German personalities? You are not going to tell the Tribunal that Habicht, who was a liaison man with the NSDAP in Austria, was a leading Reich-German personality. Who were they? You are not going to say that Austrian Nazis were leading Reich-German personalities. Who were they? Who were the leading Reich-German personalities that you were talking about?

A charitable view would be that the Tribunal was conscious that von Papen was intellectually quite able to control the cross-examination throughout and did not need its protection. However, the case of von Papen illustrates that the Tribunal did not always display judicial impartiality. Perhaps it redeemed itself by its majority verdict of acquittal of von Papen.

## 16 . Speer

The defendant Speer appears from the transcript to have been among the most impressive of all the twenty one defendants before the Tribunal. He was the third last of the defendants who gave evidence. Probably because of his apparent demeanour--deferential but not servile--and his frank admissions, he was treated by the Tribunal with tolerance. He was never interrupted and was even protected by the Tribunal from what was often puerile cross-examination by Assistant Prosecutor Raginsky, of the Soviet Union. Mr. Justice Jackson, Chief of Counsel for

the United States of America, was mild and even bland in his attitude to Speer.

No doubt this benign treatment of Speer was due largely to his admissions early in his examination-in-chief, a typical example of which was:<sup>31</sup>

Dr. Flachsner [counsel for Speer]: ..... as technical minister, do you wish to limit your responsibility to your sphere of work?

Speer: No; I should like to say something of fundamental importance here. This war has brought an inconceivable catastrophe upon the German people, and indeed started a world catastrophe. Therefore it is my unquestionable duty to assume my share of responsibility for this disaster before the German people. This is all the more my obligation, all the more my responsibility, because the head of the Government has avoided responsibility before the German people and before the world [a reference to the suicide of Hitler]. I, as an important member of the leadership of the Reich, therefore, share in the total responsibility, beginning with 1942. I will state my arguments in this connection in my final remarks.

That extract is highlighted by the following passage in Speer's memoirs:<sup>32</sup>

After reading it [the indictment] I was overwhelmed by a sense of despair. But in that despair at what had happened and my role in it, I found the position I felt I should take in the trial: to regard my own fate as insignificant, not to struggle for my own life, but to assume the responsibility in a general sense. In spite of all the opposition of my lawyer and in spite of the strains of the trial, I held fast to this resolve.

There can be no doubt, on a consideration of the transcript, that Speer had a completely fair trial.

## 17. Von Neurath

Although the Tribunal did not direct restrictions on the defendant von Neurath personally, it did constantly prevent his counsel, Dr. Ludinghausen, from putting to his client many questions which were clearly admissible.

Von Neurath was indicted on all four Counts. The particulars of his alleged individual responsibility were extremely general and devoid of specific allegations. His counsel attempted to meet the general allegations, combined with the case against von Neurath as presented by the prosecution, with a comprehensive account of his involvement with the progression of the Nazi regime, and his denial of anti-Semitic activity in Czechoslovakia, after he was appointed Reich Protector for Bohemia and Moravia on 18 March 1939. But his counsel was frequently denied by the Tribunal any opportunity to develop an in-depth defence to the allegations, which involved the whole gamut of the prosecution case as framed in the indictment.

It is clear from the transcript that the Tribunal was determined to bring the trial to as expeditious a conclusion as it could achieve. In its Judgment the Tribunal gave scant reasons for its verdict of guilty on all four Counts, other than a general finding of culpability in respect of them.

Von Neurath's case was not adequately presented, because his counsel was too frequently denied the opportunity to do so.

The Tribunal did not accord counsel for von Neurath procedural fairness.

But the procedural and evidential unfairness of the presentation of the case against von Neurath reached its height in the cross-examination of him by the Deputy Chief Prosecutor for the United Kingdom, Sir David Maxwell-Fyfe, who, without any intervention by the Tribunal, frequently abused his right to cross-examine the defendant. In particular, he:<sup>33</sup>

- (a) Often interspersed questions with comment adverse to the defendant;
- (b) Put to the defendant, in a manner which purportedly asserted their accuracy and truthfulness, a miscellany

of statements, reports of persons (some tendered before the Tribunal and some which were not subject to any form of oath) and newspaper comments; and

- (c) Interrupted the defendant's answers to questions on many occasions.

Although von Neurath was indicted on all four Counts, his cross-examination by Sir David Maxwell-Fyfe was confined almost exclusively to the years 1932 to 1940-41. It did not canvass the allegations in the indictment in respect of Counts 3 and 4. An overall assessment of the cross-examination must be that it was inadequate. The patent gaps in it were furnished by the Tribunal in its Judgment, but as the product of its own interpretation of evidence and material not elicited in cross-examination by the Principal cross-examiner.

## 18. Fritzsche

The defendant Fritzsche was indicted on Counts 1, 3 and 4; he was found not guilty on all three Counts and discharged.

Fritzsche was, from December 1938, head of the Home Press Division of the Ministry of Popular Enlightenment and Propaganda. From October 1942, he was the Ministerial Director. In November 1942 he was appointed head of the Radio Division of the Propaganda Ministry. Obviously, he, was accused at Nuremberg in the absence of any more appropriate defendant to bear the opprobrium attached to the excesses of the Nazi propaganda machine, since Dr. Goebbels had committed suicide near the end of April 1945.

The transcript of the evidence for his defence reveals a bland attitude to him by the Tribunal. Procedurally, his trial was completely fair, and neither he nor his counsel was interrupted by the Tribunal. His cross-examination by the prosecution was conducted by the Chief Prosecutor for the Soviet, General Rudenko. The defendant was the master. The Tribunal on occasions intervened to protect the defendant. Twice the President said: 'Let the man answer/explain'.<sup>34</sup>

The complete acquittal of Fritzsche was predictable, although the Soviet member of the Tribunal gave a dissenting opinion which was entitled 'The unfounded acquittal of defendant Fritzsche'. He said:<sup>35</sup> 'I consider Fritzsche's responsibility fully proven. His activity had a most basic relation to the preparation and the conduct of aggressive warfare as well as to the other crimes of the Hitler regime'. This judgment was contrary to the evidence. It was vengeful. The Soviet member of the Tribunal did not address any question to Fritzsche.

## 19. Bormann (in absentia)

Article 12 of the Charter provided:

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

Borman was indicted on Counts 1, 3 and 4. His counsel, Dr. Bergold, endeavoured to establish that it was 'most likely' that Bormann died on 1 May 1945, during an attempted escape from the Reich Chancellery. The only evidence in support of this submission was an affidavit by a woman who had been one of Bormann's large group of secretaries from the end of 1942 until after Hitler's death. The affidavit was not explicit but equivocal. Dr. Bergold said: 'That is all I am able to submit; the real witnesses have unfortunately not been found'.<sup>36</sup> He then referred to some documents which had been tendered in evidence and contained orders which had been made by Bormann. These documents were not relevant to the question of whether or not Bormann was still alive.

At a later stage, a former driver of Hitler gave evidence from which, it was sought to argue that Bormann was killed during the night of 1 May 1945 in escaping from the Reich Chancellery. The evidence was not conclusive.

Bormann was properly tried in his absence, although it proved to be a barren exercise.

In its Judgment, the I.M.T. said:<sup>37</sup>

His [Bormann's] counsel, who has laboured under difficulties, was unable to refute this evidence [that is, the evidence tendered to the Tribunal, signed by Bormann]. In the face of these documents which bear Bormann's signature it is difficult to see how he could do so even were the defendant present. Counsel has argued that Bormann is dead and that the Tribunal should not avail itself of Article 12 of the Charter ... But the evidence of death is not conclusive ... If Bormann is not dead and is later apprehended, the Control Council for Germany may, under Article 29 of the Charter, consider any facts in mitigation, and alter or reduce his sentence, if deemed proper.<sup>38</sup>

## 20 The indicted organisations

So far as the indicted organisations were concerned, a fundamental procedural decision was announced by the President on 8 June 1946 in the following terms:<sup>39</sup>

In the future, counsel for the organizations which the Prosecution have asked the Tribunal to declare to be criminal will not be permitted to examine or to cross-examine any witnesses other than the defendants in this Court. If they wish to examine or to cross-examine those witnesses, they must call them before the commissions which are sitting for the taking of evidence on the questions with which the organizations are concerned.

That decision led to an acrimonious exchange later the same day between defence counsel and the President. Defence counsel argued that the practical effect of the decision was that witnesses, other than the defendants, who gave evidence to the Tribunal were 'lost' to the defence if they could not be cross-examined. In the words of Dr. Löffler, counsel for the SA: '... we appreciate the Tribunal's grounds, but we feel obliged to point out from the point of view of the defense that these reasons are justified in theory, but entail in practice the loss of that witness'. Logical though the argument of defence counsel was, the Tribunal was unmoved and refused to hear any further argument on the question.<sup>40</sup>

The Tribunal's ruling was based on a very narrow interpretation of the words in Article 9 of the Charter—'... The Tribunal may direct in what manner the applicants shall be represented and heard.' Article 9 also provided that '... any member of the organisation will be entitled to apply to the Tribunal for leave to be heard by the Tribunal upon the question of the criminal character of the organisation'.

Article 16 of the Charter contained provisions for the fair trial of defendants, but those provisions did not extend expressly to the 'indicted' organisations. The consequences of a declaration that a group or organisation was criminal were potentially extremely grave (see Chapter 9). Although the ruling was expedient from the viewpoint of an expeditious trial and was arguably within the discretion of the 'Tribunal under Article 9, it was in conflict with a fundamental principle of justice to the extent that the exercise of the Tribunal's discretion was vitiated. The fault was heightened by the fact that the ruling was made without defence counsel being permitted an opportunity to present argument.

## CONCLUSION

In the individual cases of unfairness, in the writer's opinion, discussed in this Appendix, I have placed emphasis on a strict forensic approach to questions of procedure and evidence. Regard has also been paid to the provisions of the London Agreement and Charter, by which the Tribunal was bound, particularly the requirement that the trial be confined to 'an expeditious hearing of the issues raised by the charges' (Article 18(a)). I am not satisfied that in any of the cases in which unfairness was apparent, the ultimate result was thereby affected. In particular, Schacht, von Papen and Fritzsche were acquitted of all charges.

## NOTES TO APPENDIX I

1. Nuremberg Trial, I.M.T., vol. IX, p. 326.
2. Ibid., p. 656.
3. Ibid., pp. 661-672.
4. Ibid., p. 673.
5. Nuremberg Trial, I.M.T., vol. X, pp. 415-425.
6. Ibid., p. 420.
7. Nuremberg Trial, I.M.T., vol. X, pp. 626-652; vol. XI, pp. 1-24.
8. Nuremberg Trial, I.M.T., vol. XI, p. 260 et seq.
9. For example, Mr. Dodd, American Executive Trial Counsel, was permitted to read a document, which was an exhibit, in his cross-examination of the defendant Rosenberg. The reading of the document involved several pages of transcript (ibid., pp. 541-555). It was followed by questions containing the observations of counsel from the bar table (ibid., p. 546). Shortly afterwards (ibid., p. 549) the President said to Rosenber:  
  
 'You must answer the question "yes" or "no" and explain, if you must explain, shortly'.  
  
 Mr. Dodd continued to harass Rosenberg. For example, counsel asked the witness (ibid., p. 551): 'Did you recommend Koch [Erich Koch] for that job [Reich Commissioner in Moscow] as a particularly ruthless man in April of 1941? "Yes" or "No".' Obviously there were two questions involved. Rosenberg answered 'Yes', but whether, to the first, second or both questions was not clear. Counsel responded: 'Just a minute. You have done a lot of talking here for the last day and today; if you will just give me a chance once in a while'. Counsel was not reprimanded. He should have been.
10. Nuremberg Trial, I.M.T., vol. XVIII, pp. 119-120.
11. Nuremberg Trial, I.M.T., vol. XVII, pp. 600-601.
12. Nuremberg Trial, I.M.T., vol. XII, pp. 156-305.
13. Ibid., p. 246.
14. Ibid., p. 279.
15. Ibid., p. 234.
16. Ibid., p. 311.
17. Ibid., pp. 423-424.
18. Ibid., p. 457.
19. Ibid., pp. 446-448; p. 471.
20. See, for example, ibid., p. 560, the concluding response of Schacht in his examination-in-chief:



I warned against excessive armament. I impeded, and, if you like, sabotaged effective armament through my economic policy. I resigned from the Ministry of Economics against the will of Hitler; I publicly protested to Hitler against all the abuses of the Party; continuously warned people abroad and gave them information; I attempted to influence the policy of other nations with respect to the colonial question in order to achieve a more peaceful atmosphere ... I blocked Hitler's credits and I finally tried to remove him.

21. For example, see ibid., pp. 480-482.
22. Nuremberg Trial, I.M.T., vol. XIII, pp. 502-503.
23. I.M.T. Judgment, pp. 113-114.
24. Nuremberg Trial, I.M.T., vol. XIV, p. 605.
25. Nuremberg Trial, I.M.T., vol. XV, pp. 61-62.
26. Ibid., p. 175.
27. For example, see ibid., p. 459, p. 468, p. 477 and p. 487.
28. Nuremberg Trial, I.M.T., vol. XV, pp. 560-561:

The Tribunal (Mr. Biddle): Now, only one other question, about Russia; I want to see if I understood your point clearly. You feared an invasion of Germany by Russia; is that right?

Jodl: I expected, at a certain moment, either political blackmail on the strength of the large troop concentration or an attack.

Mr. Biddle: Now, please, Defendant, I asked you if you did not fear an attack by Russia. You did at one time, did you not?

Jodl: Yes, I was afraid of that.

Mr. Biddle: All right. When was that? When?

Jodl: It began through ... [interruption]

Mr. Biddle: When did you fear it? When did you first fear that attack?

Jodl: I had that fear for the first time during the summer of 1940; it arose from the first talks with the Fuhrer at the Berghof on 29 July.

Mr. Biddle: Then from the military point of view, from that moment on, it was necessary for you to attack first, was it not?

Jodl: After the political clarification, only then; up to then it had only been a conjecture.

Mr. Biddle: How could you afford to wait for the political clarifying work if you were afraid of an immediate attack?

Jodl: For that reason we increased our defensive measures to begin with, until the Spring of 1941. Up to then we only took measures for defense. It was not until February 1941 we began concentrating troops for an attack.

Mr. Biddle: Now, then, just one other question. I am not at all clear on this. During that attack did you

then advise that Germany attack first, or did you advise that Germany should not attack? What was your advice? You saw this danger; what did you do about it?

Jodl: That problem, too, like most of the others, was the subject of a written statement I made to the Fuhrer in which I drew his attention to the tremendous military effects of such a decision. One knew of course how the campaign would begin. But no human being could imagine how it would end... [interruption]

Mr. Biddle: We have heard all that. I did not want to go into that. What I wanted to get at is this: You were afraid that Russia was going to attack. If that was true, why didn't you advise Germany to attack at once? You were afraid Russia would attack, and yet you say you advised against moving into Russia. I do not understand.

Jodl: That is not the case. I did not advise against marching into Russia; I merely said that if there were no other possibility and if there was really no political way of avoiding the danger, then I, too, could only see the possibility of a preventive attack.

29. Nuremberg Trial, I.M.T., vol. XVI, p. 394.
30. Ibid., p. 370.
31. Ibid., p. 483.
32. Speer, Inside the Third Reich, Bonanza Books, New York, 1982 edn., p. 510.
33. Nuremberg Trial, I.M.T., vol. XVII, pp. 19-73.
34. Nuremberg Trial, I.M.T., vol. XVIII, p. 218 and p. 219.
35. I.M.T. Judgment, p. 140.
36. Nuremberg Trial, I.M.T., vol. XVII, p. 264.
37. I.M.T. Judgment, p. 130.
38. See Manning, Martin Bormann - Nazi in Exile, Lyle Stuart Inc., N.J., 1981. Paul Manning, formerly a renowned war correspondent, asserts that Bormann escaped to South America. Superficially at least, the evidence on which this claim is based seems cogent.
39. Nuremberg Trial, I.M.T., vol. XV, p. 575.
40. Ibid., pp. 593-594.

## CHAPTER 11 THE NUREMBERG JUDGMENT: AN ANALYSIS

### INTRODUCTION: STRUCTURE OF THE JUDGMENT

The London Agreement and Charter, the indictment and the I.M.T. Judgment are interlinked, and an analysis of the Judgment involves some additional discussion of the Agreement and Charter and of the indictment, which are the subjects of Chapters 7 and 8 respectively. It has been necessary, in evaluating the Judgment, to recognise the joint treatment by some authors of the four documents.

In a summary initial reference to the indictment, the Tribunal listed the Counts in order of 2, 3, 4 and 1 (the latter being the conspiracy Count).

The Tribunal stressed that the case against the defendants 'rested in a large measure on documents of their own making, the authenticity of which has not been challenged, except in one or two cases'.

The Tribunal repeated the provisions of Article 6 of the Charter and stated: 'these provisions are binding upon the Tribunal as the law to be applied to the case' (emphasis added). That fundamental statement will be discussed later against the background of the Tribunal's elaboration of it.

The final general introductory observation of the Tribunal was: 'For the purpose of showing the background of the aggressive war and war crimes charged in the indictment, the Tribunal will begin by reviewing some of the events that followed the first world war, and in particular by tracing the growth of the Nazi Party under Hitler's leadership to a position of supreme power from which it controlled the destiny of the whole German people, and paved the way for the alleged commission of all the crimes charged against the defendants'.

The next section of the Judgment surveyed in some detail the pre-war Nazi regime in Germany, from the origin and public pronouncement of the aims of the Nazi Party,<sup>2</sup> its seizure and consolidation of power, leading to the measures of rearmament that it adopted. Much of this section dealt with matters included in Count 1 of the indictment, particularly the allegation that the Nazi Party was the 'central core of the common plan or conspiracy' (Count 1, Paragraph IV (A).)

After some early doubts, and subject to the views expressed in Chapters 8 and 18 concerning the validity of Count 1 as an expression of established international law, the writer considers that the particulars under that Count, the evidence accepted in relation to those particulars and the discussion and findings of the Tribunal in relation thereto were in accordance with normal legal principles, and that, in any event, the evidence was admissible as part of the res gestae.<sup>3</sup>

Against the jurisdictional background provided by Article 6 (a) of the Charter, it is noteworthy that the Judgment of the Tribunal (p. 13 *et seq*) dealt together with Counts 1 and 2. It stated: 'It will be convenient to consider the question of the existence of a common plan [Count 1] and the question of aggressive war [Count 2] together ...'. In fact, the indictment had inextricably assimilated the two separate allegations. Count 2 was a conglomerate allegation of the commission of the commission of crimes against peace as defined in Article 6 (a). Count 1 was confined to the separate averred crime of conspiracy to commit crimes against peace, war crimes and crimes against humanity. Particulars under Count 2 did not include the annexation of Austria or the seizure of Czechoslovakia. They began with initiation of the war against Poland on 1 September 1939 and ended with the declaration of war against America on 11 December 1941. Further, in Count 2 it was merely stated: 'Reference is hereby made to Count One of the Indictment for the allegations charging that these wars were wars of aggression on the part of the defendants.' The legal consequences of the Tribunal co-mingling its consideration of Counts 1 and 2 will be discussed later.

#### Violations of international treaties

In strict conformity with the provisions of Article 6 (a) of the Charter, the Judgment stated (p. 36):

The Charter defines as a crime the planning or waging of war that is a war of aggression or a war in violation of 'international treaties. The Tribunal has decided that certain of the defendants planned and waged aggressive wars against twelve nations, and were therefore guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also "wars in violation of international treaties, agreements, or assurances". [emphasis added] These treaties are set out in Appendix C of the Indictment. [In fact, twenty six treaties, agreements or assurances were pleaded. They are hereafter collectively described as 'treaties'].

The Tribunal then made brief reference to three of the relevant Treaties:- The 1899 and 1907 Hague Conventions, the Versailles Treaty and the 1928 Kellogg-Briand Pact. It merely mentioned other treaties of mutual guarantee, arbitration and non-aggression. Only a small number of findings of breaches of treaties were made, and the Tribunal concluded that section of judgment with the observation (p. 38):

The Tribunal does not find it necessary to consider any of the other treaties referred to in the Appendix, or the repeated agreements and assurances of her peaceful intentions entered into by Germany.

However, the Tribunal stated (p. 38) that it had made full reference to the nature of the Kellogg-Briand Pact and its legal effect in another part of its judgment. 'It is therefore not necessary to discuss the matter further here, save to state that in the opinion of the Tribunal this Pact was violated by Germany in all the cases of aggressive war charged in the Indictment'. (Because of the emphasis placed by the prosecution and the Tribunal on the relevance of the Pact of Paris to the crime of aggressive war, that question will be discussed separately in Chapter 18).

In respect of Article 6 (a) of the Charter, the Tribunal was content to base its determination of guilt against a number of the accused on its finding that they had planned and waged aggressive wars. That finding alone was sufficient to support convictions under Count 1, assuming that Count was properly included in the indictment and pursued by the prosecution together with the substantive offences alleged to be the object of the conspiracy. The findings and observations of the Tribunal in relation to the alleged violations of treaties were, in strict law, obiter. No doubt the Tribunal considered that it should address the question to some degree;<sup>4</sup> further, the nature and extent of any proved violations were relevant to punishment. The Tribunal was legally entitled to adopt the restricted approach which it did. It was, however, unfortunate that the prosecution relied so strongly in opening and closing addresses on alleged violations of treaties and adduced voluminous evidence in relation hereto. Had it not done so, or, in view of the alternative bases for establishing guilt under Count 1, if defence counsel had sought a ruling at an early stage from the Tribunal as to the scope of the pleading, the length of the trial may have been considerably shortened.

The Tribunals which decided the 'Subsequent Proceedings' generally adopted what was a more practical and realistic judicial approach to 'Crimes against Peace'.<sup>5</sup>

## THE LAW OF THE CHARTER

The Tribunal began its discussion of 'The Law of the Charter' by stating (p. 38):

The jurisdiction of the Tribunal is defined in the Agreement and Charter, and the crimes coming within the jurisdiction, for which there shall be individual responsibility, are set out in Article 6. The law of the Charter is decisive, and binding upon the Tribunal'. (emphasis added).

The following extract is the most important, and has been the most controversial, in the Judgment (p. 38):

The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world. The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. With regard to the constitution of the court, all that the defendants are entitled to ask is to receive a fair trial on the facts and law.

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defence, and will express its view on the matter.

There are fundamental matters which should be discussed in the context of the above cited extracts from the Judgment.

As is emphasised in Chapter 18, Germany had surrendered unconditionally to the four Allied Powers, which were in occupation of the whole of the country from 8 May 1945, and remained so until long after the Tribunal's Judgment had been delivered and the punishment resulting from it had been put into effect.

In such circumstances, the validity of the assertion by the Tribunal that the making of the Charter [and the Agreement] was an exercise of 'sovereign legislative power' can initially be considered strictly from the viewpoint of existing international law, without regard to the manner of the exercise of such power or the precise content of those instruments.

The Tribunal did not justify its basic assertion by reference to any judicial authority, works by learned authors or any other precedent. Indeed, in his opening statement the President of the Tribunal described the trial as 'unique in the history of the jurisprudence of the world'. More fundamental scrutiny of the assertion is therefore necessary.

The treatment by Professor Lauterpacht of the issue is in some respects equivocal. His initial view is thus expressed:-<sup>6</sup>

In contradistinction to hostile acts of soldiers by which the latter do not lose their privilege of being treated as lawful members of armed forces, war crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders. They include acts contrary to International Law perpetrated in violation of the law of the criminal's own State, such as killing or plunder for satisfying private lust and gain, as well as criminal acts contrary to the laws of war committed by order and on behalf of the enemy State. To that extent the notion of war crimes is based on the view that States and their organs are subject to criminal responsibility under International Law.

In his subsequent discussion of the issue, Professor Lauterpacht stated:<sup>7</sup>

The question whether the conferment of jurisdiction upon the Tribunal with regard to crimes against peace constituted an innovation in International Law (i.e. the question whether recourse to aggressive war is criminal or merely unlawful) is discussed elsewhere in this volume and answered in the negative

[this proposition will be considered later]. In the Judgment of the Tribunal, only one [this is not correct] out of twenty one accused was found guilty under that head alone and sentenced to life imprisonment. Similarly, only two of the accused were found guilty of crimes against humanity alone. All other accused who were sentenced by the Tribunal were found guilty, in addition to other crimes, of ordinary war crimes as defined in the Charter in full conformity with existing law. In the light of that fact the ... Tribunal ... must be viewed primarily as a tribunal constituted for the punishment of war crimes proper. This was done through the joint exercise, by the four States which established the Tribunal, of a right which each of them was entitled to exercise separately on its own responsibility in accordance with International Law.

I confess to being perplexed by the following footnote which Professor Lauterpacht appended to the text immediately above cited:<sup>8</sup>

In view of this it may be difficult to accept without substantial qualification, the following statement in the Judgment of the Tribunal: 'The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world'. however, in the same passage the Tribunal proceeded to state that the Charter was not in the nature of an arbitrary exercise on the part of the victorious nations, but an expression of existing International Law according to which aggressive war was not only illegal, but also criminal.

Professor Lauterpacht then observed:<sup>9</sup>

The combination of the question of the punishment of war crimes by an international organ with the question of criminal jurisdiction is probably calculated to complicate a problem which in itself is of considerable difficulty.

Thus in a text covering 22 pages (Chapter VI, Part IV, *ibid.*), Professor Lauterpacht, as editor of the 7th edition of Oppenheim's work, did not support, without qualifications, the Tribunal's cited pronouncement.

It is therefore necessary to examine his more general treatment of the question in an earlier part of the text.<sup>10</sup> I am unable to find in that chapter, or infer from it, any endorsement of the Tribunal's assertion of the 'exercise of sovereign legislative power'. Moreover, the following footnote <sup>11</sup> appears to the writer to obscure Professor Lauterpacht's views even more:

It is therefore possible that much--though not all--of the criticism of the Charter of the Tribunal might have been avoided, without substantially affecting the result of the proceedings, if it had been limited to war crimes proper. For criticism of the Charter on the ground of the alleged retroactivity of its provisions has been directed almost exclusively to 'crimes against the peace' and 'crimes against humanity'. The Tribunal--rightly, it is believed ... rejected the view that with regard to crimes against the peace the provisions of the Charter were retroactive. It also observed that the maxim nullum crimen sine lege is not a limitation of the sovereign legislative power but a principle of justice.

In general, it would appear that the decision of the authors of the Charter to include in the indictment the charge of crimes against the peace was supported not only by a correct appreciation of the legal position on the subject but also by most compelling considerations of international peace and of justice. The same, in a different sphere, applies to the charge of crimes against humanity--a provision of significance inasmuch as it affirmed the existence of fundamental human rights superior to the law of the State and protected by international criminal sanction even if violated in pursuance of the law of the State. ...

However, the provisions of the Charter in this matter were somewhat ambiguous. In their original formulation they seemed to give to the Tribunal jurisdiction with regard to crimes against humanity irrespective of their connection with crimes against the peace or war crimes.

As the result of a Protocol subsequently signed on October 6, 1945, the semi-colon, in the English and

French texts, after the words 'during the war' in Article 6 (c) was replaced by a comma to correspond with the Russian text. In consequence, though for no apparent imperative reason, the Tribunal held that it had jurisdiction only in respect of such acts enumerated in Article 6 (c) as had taken place after the commencement of the war.

In so far as crimes against humanity were, prior to the war, committed in pursuance of a policy of initiation and preparation of a war of aggression, they ought to have been considered to fall within the jurisdiction of the Tribunal.

It is possible that an international military tribunal concerned primarily with war crimes proper may not have been the proper agency for exacting punishment for crimes against humanity. For the cumulation of jurisdiction in respect of war crimes and crimes against humanity tended both to draw uninformed criticism upon the charge of war crimes and, in the end, to reduce the effectiveness of the charge of crimes against humanity. On the other hand, there were cogent and decisive objections against setting up different courts to try the same accused.

## THE VIEWS OF PROMINENT AUTHORS, JURISTS AND THE UNITED NATIONS ORGANISATION

It is now proposed to consider some of the other literature and comments selected from a vast mass, limited to a discussion of the Tribunal's Judgment concerning 'The Law of the Charter'.

### Professor Lauterpacht

In his work 'International Law and Human Rights' published in 1950, Professor Lauterpacht discussed only 'Crimes Against Humanity' in relation to the London Agreement and Charter, and limited that discussion to the essential context of his thesis, in the light of the provisions in the Charter of the United Nations: that is the securing of the natural and inalienable rights of man.

### Mr. Justice Jackson

In his opening address to the Tribunal, Mr. Justice Jackson referred to some of the legal issues involved, such as the concept of an 'aggressive war' and 'crimes against peace'. He did not touch upon the 'sovereign legislative power' of the Allied Powers.

### Brigadier General Taylor

Brigadier General Taylor, in a very brief reference to the part of the Judgment under discussion, did not mention the question of 'sovereign legislative power'.<sup>12</sup>

Nearly all authors do not differentiate between the concept of 'sovereign legislative power' and the provision in the Charter prescribing a war of aggression as a crime against peace. But the stated concept, if it were correct, is the root of all that followed the capitulation of the German Armed Forces, culminating in the execution of the London Agreement and Charter. Without that root, the provisions of the Agreement and Charter would have acquired a different perspective.

### Calvocoressi

In his discussion of the subject, Calvocoressi<sup>13</sup> ignores the Tribunal's assertion of sovereign legislative power and justifies the formulation of the Agreement and Charter on their expression and application of existing, international law. In the view of the writer, the source of such justification must be distinguished from the Tribunal's rationalisation that 'the law of the Charter is decisive and binding' and that its derivative force was the sovereign legislative power of the Allies.

### Professor Brownlie

A more logically constructed exposition of the legal basis for the Agreement and Charter was published by Professor Ian Brownlie in 1963.

The exposition was a chronological analysis of opening addresses by prosecution counsel, the argument by defence counsel with its concentration on the *ex post facto* character of the law stated in the Charter, and the widespread affirmation of the principles declared in the Judgment, including the judgments of the Tokyo Tribunal and in the 'Subsequent Proceedings' at Nuremberg. Professor Brownlie's arguments, to which further reference will later be made, are persuasive that it was the manner of expression of the reasoning of the Tribunal rather than its content which led to much of the criticism of its validity.<sup>14</sup>

### Professor Emeritus Morgan

A contrary view was expressed at an early stage by Professor Emeritus J.H. Morgan K.C.<sup>15</sup> Before this view is considered, it is convenient to set out the following extracts from the preface of that monograph by Viscount Maugham, formerly Lord Chancellor:<sup>16</sup>

The validity and effectiveness, of this epoch-making Agreement rested upon the fact that the whole area of Germany was in the occupation of the armies of the four Powers who were parties to it. Their *de facto* authority over that territory was fully established. The German Government, having ceased to exist, it was necessary that public order and safety should be reestablished until a new German government (or governments) should be set up under a treaty of peace. I will not attempt to define the limits of the rights of occupying authorities in such a case according to the rules of International Law. On the one hand, they have not been settled; and on the other, an attempt to guide or interfere with the steps taken by a victorious army in a conquered land would seldom or never be a profitable enterprise. It was definitely a military court with laws or principles of its own.

I think his [Professor Emeritus Morgan's] criticisms are unanswerable; and I much regret that the Tribunal, being a military tribunal appointed for a special purpose, thought fit to travel outside its proper jurisdiction.

... Offences against the laws and customs of war have long been recognised as punishable by the military courts of a belligerent. But when it comes to doubtful additions, to the terms of the Pact of Paris, the defence of 'Superior Orders', the liability of persons for laws made *ex post facto*, I will assert that there is the greatest doubt whether propositions on these matters have received such agreement by the general body of civilised nations, namely, the assent to be bound by the propositions, as would be necessary to qualify them as rules of International Law.



Expressed against the background of his experience as British Deputy Adjutant-General, the views of Professor Emeritus Morgan merit close attention. In summary, they were that the only Count in the indictment that legally was invulnerable to criticism was Count 3--that is, war crimes. Before expanding on Professor Morgan's views, limited to the context of this chapter, it is convenient to reproduce his prefatory observations:<sup>17</sup>

In questioning, however, the validity in International Law of two, possibly three, of the Counts of the Indictment, I would not have it supposed for a moment that I question either the jurisdiction of the Court or the 'law' it laid down on those three Counts, so far as Germany and German law are concerned. It must always be remembered that, under the terms of the 'Unconditional Surrender' of Germany all sovereignty, including legislative sovereignty, over the country passed to the four Allied Governments, who assumed 'supreme authority'.<sup>18</sup> Thereby they acquired full authority to make what laws for Germany they pleased, including what lawyers call ex post facto, in other words retrospective, legislation. It was long ago laid down by Lord Mansfield in a famous case, Campbell v Hall,<sup>19</sup> that 'conquest' invests the conquering Power with the prerogative right 'to make what law he pleases' for the conquered country, subject always to any conditions in the articles of capitulation. In this case there were no such articles and, therefore, no such qualification. The 'Agreement', providing for the establishment of the Tribunal, as also 'the charter of the Tribunal', were legitimate exercises of such sovereignty. And the Charter declares that the planning and waging of a war of aggression and the 'conspiracy' to that effect 'are crimes coming within the jurisdiction of the Tribunal', which Tribunal 'cannot be challenged by the prosecution or by the defendants or their counsel.' But nowhere do either of these documents, or the Indictment itself, declare that the offences charged are offences against International Law, an elementary fact which every commentator appears hitherto to have overlooked. In his massive opening speech—a speech in every way worthy of the highest traditions of forensic oratory—the Attorney-General, Sir Hartley Shawcross, declared, with perfect truth, that the Charter of the Tribunal, 'has prescribed that wars of aggression are crimes' and that 'the Charter is the Statute and the Law of this Court,' adding that it was 'not incumbent upon the prosecution to prove that they are, or ought to be, international crimes'. Nor was it incumbent.

It is considered that the prefatory statement reaches the heart of the difficulty in examining the coherence of the Judgment under the heading of 'The Law of the Charter' and the first two paragraphs thereunder. Although the final opinion of the author on this fundamental issue, as also is the case with many others, is deferred until Chapter 18, it is convenient at this stage to express complete concurrence with the propositions advanced by Professor Morgan.<sup>20</sup>

## United Nations Organisation

The force of the basic argument advanced immediately above is strengthened by an official United Nations document,<sup>21</sup> extracts from which are:

The Agreement and the Charter thus appear as a lex in casu to be applied by an ad hoc tribunal to a special case or group of cases. This situation was recognised by the Tribunal [in passages cited above].

But, on the other side, the Court allowed the prosecution and the defence to present extensive arguments as to whether or not the Charter could be considered as compatible with existing international law. It is true that the Tribunal dismissed a motion made by the defence at the beginning of the proceedings, expressing doubts as to the consistency with international law of certain provisions in the Charter and that an opinion on the legal basis of the trial be, secured from internationally recognised experts ... The motion was disallowed, however, only in so far as it constituted a plea to the jurisdiction of the Court [Article 3 of the Charter].

In so far as it contained other arguments, the Court declared itself prepared to hear them at a later stage. And not only was the compatibility of the Charter with existing international law discussed by the parties. The Court itself examined this problem carefully when interpreting and applying several of the provisions of the Charter. [There followed references to the Judgment which have already been cited above].

According to the Court, the Charter has then a double foundation [emphasis added] in international law. Firstly, it was created by the signatory Powers in the exercise of their competence under international law; and secondly, the Charter does not, as to its contents, deviate from the law of nations, it merely gives expression to already existing international law.

The Court thus considerably widened the scope of the Charter and, at the same time, of its own findings. It affirmed the validity of the Charter not only as a lex in casu, as the law of the case which it had been set to judge, but also as an authoritative expression of general international law [which became binding on the Tribunals which determined the 'Subsequent Proceedings' at Nuremberg]. And it consequently presented its interpretation and application not only of a lex in casu but also of general international law.

### Professor Glueck

It is instructive to examine some of the literature written in the closing months of World War II before the plans for the principal Nuremberg Trial had been crystallised. As an example, Professor Glueck, in his treatment of 'Violations of Law by Axis Nationals', wrote in September 1944:<sup>22</sup>

... let us define 'war criminals'. Considering the Nazi conception of 'total war', we may legitimately define war criminals as persons—regardless of military or political rank—who, in connection with the military, political, economic or industrial preparation for or waging of war, have, in their official capacity, committed acts contrary to (a) the law and customs of legitimate warfare or (b) the principles of criminal law generally observed in civilized States; or who have incited, ordered, procured, counselled or conspired in the commission of such acts; or having knowledge that such acts were about to be committed, and possessing the duty and power to prevent them, have failed to do so.

Professor Glueck identified five features of this definition:

First, it is not intended to include the 'crime' of flagrantly violating solemn treaty obligations or conducting a war of aggression;

Secondly, we do not include illegal acts by soldiers ... in their private, non-official capacity ... these are punishable by domestic tribunals;

Thirdly, we include those persons--usually high-placed officers or political persons who, in the words of the Moscow Declaration ... 'have taken a consenting part in the above atrocities, massacres and executions'.

Fourthly, we include not only military heads but political chieftains and henchmen;

Finally, we include high-ranking, policy-framing industrialists and bankers with political connections.

Professor Glueck considered that the acts enumerated in the last two paragraphs were of a kind 'which

might more appropriately and conveniently be tried in the ordinary national courts of the victims'. However, he added: '... but some of these crimes are of such a serious and widespread nature that they ought to be prosecuted under the joint auspices of the United Nations'.

### Professor Woetzel

Professor Woetzel, in his penetrating analysis of the historical developments relating to 'Crimes Against Peace'<sup>23</sup>, does not express a definitive view as to whether or not the Tribunal correctly equated the provisions of Article 6 (a) of the Charter with existing recognised international penal law. His conclusion is thus expressed:<sup>24</sup>

While none of these arguments constitutes sufficient legal basis for the crime against peace, it is clear from the discussion in the preceding chapters that confirmation of the principles of the Charter and the Judgment by the international community would justify the I.M.T. in assuming that individuals could be held liable for the crime against peace. Such endorsement would not definitely confirm this delict as part of international law; this would depend on the future practice of states. But, as has been shown, it would constitute sufficient basis for assuming that it was an international crime for which individuals could be held liable. (emphasis added).

Professor Woetzel's views concerning the legal significance of the Pact of Paris will be considered in Chapter 18. In the present context it is, however, convenient to refer to his discussion relating to the rights of the Allied Powers as occupants of Germany at the time at which the London Agreement and Charter were executed. In discussing the conflicting arguments of a number of authors, Professor Woetzel states: <sup>25</sup>

The Allies were, therefore [it has been argued] bound by Article 43 of the Hague Rules, and their military tribunals could only prosecute crimes which had been committed before the beginning of occupation if the German courts were not able to function. It has been pointed out that this was not the case after the winter of 1945. If the conditions did not warrant the exercise of power under Article 43, the occupying states did not have the right to take jurisdiction over any crimes, except war crimes, which had been perpetrated before the beginning of the state of occupation.<sup>26</sup>

But the view canvassed in the above cited passage has not found general acceptance. Professor Woetzel's own opinion appears to be expressed in the following passage:<sup>27</sup>

There is evidence for the conclusion that the Allies did not regard the Hague Rules as applicable for the occupation of Germany, and they felt justified in assuming the 'supreme authority' and exercising it with regard to the war crimes trials. This standpoint has been supported by many writers.

### Professor Wright

In a general survey of the law of the Nuremberg Trial, Professor Quincy Wright expressed this view:<sup>28</sup>

The idea that the four powers acting in the interest of the United Nations had the right to legislate for the entire community of nations, though given some support by Art. 5 of the Moscow Declaration of

November 1, 1943, and by Art. 2 (6) of the Charter of the United Nations was not referred to by the Tribunal. The preamble of the agreement of August 8, 1945, however, declares that the four powers in making the agreement 'act in the interests of all the United Nations' and invited any government of the United Nations to adhere, and nineteen of them did so. Since the Charter of the United Nations assumed that that organization could declare principles binding on non-members, it may be that the United Nations (sic) in making the agreement for the Nuremberg Tribunal intended to act for the community of nations as a whole, thus making universal international law. While such an assumption of competence would theoretically be a novelty in international law, it would accord with the practice established during the nineteenth century under which leading powers exercised a predominant influence in initiating new rules of international law. It is not, however, necessary to make any such assumption in order to support the right of the parties to the Charter to give the Tribunal the jurisdiction it asserted. That right can be amply supported by the position of these powers as the Government of Germany or from the sovereign right of each to exercise universal jurisdiction over the offenses stated.

With full respect, one finds some of the assertions in the cited extract confusing. The Charter of the United Nations did not come into effect until 24 October 1945. The 'examples, by analogy, cited in a footnote <sup>29</sup> are not convincing and appear remote.

#### Professor Finch

In the same volume of the American Journal of International Law, Professor G.A. Finch, Editor-in-Chief of the journal, strongly criticised what he described as the obiter dicta (as they were) in the Judgment.<sup>30</sup> He stated:<sup>31</sup>

The charge of Crimes against Peace is a new international criminal concept. It was not envisaged in the warnings issued by the Allies before hostilities ended nor made a part of the original terms of reference to the United Nations War Crimes Commission established in London during the war. It may be traced to the influence of Professor A.N. Trainin, of the Institute of Law of the Moscow Academy of Sciences.

Professor Finch also trenchantly criticised the Tribunal's Judgment in relation to the effect and force of the Pact of Paris,<sup>32</sup> an issue which will be considered in detail in Chapter 18.

#### Professor Jescheck

Professor Jescheck, in a typically restrained article, wrote:<sup>33</sup>

The Judgment of the Court affirmed individual liability for the crime against peace on the basis of the Charter—which was characterized as 'decisive and binding upon the Tribunal'—and also, in supporting dicta, on the basis of already existent international law. The latter ground for the decision is very questionable, since this legal norm existed neither in written nor in unwritten international law prior to 1945. Another disputed legal question involved the scope of individual responsibility for the conduct of a war of aggression. Fleet Admiral Donitz was unexpectedly convicted on this point, although he had been promoted to Naval Commander-in-Chief only in January 1943; the Tribunal supported this decision with the reasoning that 'Donitz was consulted almost continuously by Hitler'.

## The United Nations War Crimes Commission

Dr. Litawski, the author of Chapter IX of History of the United Nations War Crimes Commission, expressed the following somewhat generalised conclusions:<sup>34</sup>

The work done in the field of International law by the victorious United Nations and embodied in the Four Power Agreement for the Prosecution and Punishment of the Major War Criminals, and further developed by the International Military Tribunal is of momentous importance. The Tribunal was fully conscious that its task was not limited to the solution of the problem which it was directly facing, namely, the punishment of the German Major War Criminals, but that its work would be of fundamental importance for the future development of international law. The Tribunal stated in the Judgment that the Charter is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

Thus the Tribunal made it clear that the law of the Charter was declaratory of existing international customary law and would be applicable to any future transgressor. This means that aggressive war involves personal responsibility of the leaders of the aggressor States, similar to the responsibility for war crimes in the technical meaning of the term.

It is obvious that much more has to be done than has been achieved up to now. It is true that the foundations have been firmly laid down, but the erection of the whole building of peace-protecting measures of international law has hardly begun.

This requires further legislative work based on the Charter and the findings of the Tribunal, development of the principles enunciated in those documents, the entrusting of the application of adopted principles in a supreme judicial body, and, finally, the most difficult task of making sure that effective sanctions would be applied to any future transgressor.

## Conclusion

From the foregoing discussion of a number of expressions of opinion (although they are, of course, only a minuscule of the available relevant literature<sup>35</sup>), it is apparent that the conflict of views as to the correctness in law of the fundamental principles expounded in the Judgment; is stark and irreconcilable.

The Tribunal placed particular emphasis on its perception of the legal effect of the Pact of Paris. Almost half of the Judgment under the heading of 'The Law of the Charter' was devoted to that question, although the Tribunal stated that it was 'not strictly necessary' to do so. Further discussion of the issues already referred to is postponed until Chapter 18.

It remains to mention in the present context the only published judicial authority to which the Tribunal referred in its Judgment: Ex Parte Quirin, (1942) 317 United States Reports, 1. In dealing with two defence submissions, the Tribunal said (p. 41):

It was submitted that international law is concerned with the actions of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposed duties and liabilities upon individuals as well as upon States has long been recognised. In the recent case of Ex Parte Quirin (1942 317 US 1), before the Supreme Court of the United States, persons were charged during the war with landing in the United States for purposes of spying and sabotage.

The Late Chief Justice Stone, speaking for the Court, said:

'From the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals'

He went on to give a list of cases tried by the Courts, where individual offenders were charged with offences against the laws of nations, and particularly the laws of war. Many other authorities could be cited, but enough has been said to show that individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

The defence arguments were not sustainable in law, particularly in view of Article 7 of the Charter, and the cited authority is not of any significance in an analysis of the Judgment.

## THE LAW AS TO THE COMMON PLAN OR CONSPIRACY

This section of the Judgment occupied two printed pages.

The Tribunal obviously was conscious of the difficulty created by the joinder in Article 6 (a) of the Charter of three separate crimes: (1) the planning, preparation, initiation or waging of a war of aggression, and (2) planning, preparation, initiation or waging of a war in violation of international Treaties, agreements or assurances, and (3) participation in a common plan or conspiracy for the accomplishment of 'any of the foregoing'.

Count: 1 of the indictment, by the technique of alleging conspiracy to commit three separate crimes, namely crimes against peace, war crimes and crimes against humanity, coupled with the expansive scope of the concluding separate paragraph at the end of Article 6 (a) and the provision or 'individual responsibility' in the opening words of Article 6 (a), in reality embraced all the charges against all of the defendants.

In order to obviate the practical consequences of the all-embracing pleading in Count 1, the Tribunal construed Counts 1 and 2 in these terms (p. 42):

Count One charges the common plan or conspiracy. Count Two charges the planning and waging of war [this was an abbreviated description of the actual pleading in Count 2]. The same evidence has been introduced to support both Counts. We shall therefore discuss both Counts together, as they are in substance the same. The defendants have been charged under both counts and their guilt under each Count must be determined.

In fact, sixteen of the accused were charged in the indictment under each of Counts 1 and 2, regardless of other charges. Eight of those sixteen were convicted on both of those Counts. Four of the sixteen were acquitted under Count 1 but convicted under Count 2. The remaining four of those sixteen were found not guilty under each of Counts 1 and 2.

Of the six accused who were not charged under each of Counts 1 and 2, all six were charged under Count 1 but not under Count 2.

In view of that statistical analysis, it is difficult to comprehend the statement in the Judgment emphasised above that 'they [Counts 1 and 2] are in substance the same'.

The Tribunal's Judgment is more confusing in view of three elements of the indictment. First, Count 1, in its terms, charged all the defendants with conspiracy thereunder; second, paragraph IV (G) 3 of 'Particulars of the

nature and development of the common plan or conspiracy' under Count 1 alleged that the defendants were guilty of conspiracy for the accomplishment of crimes against peace, to commit crimes against humanity and to commit war crimes; third, Appendix A of the indictment provided particulars against all the original twenty four accused under Count 1 and against seventeen of them under Count 2 (von Krupp did not stand trial (see Chapter 10) and Ley committed suicide).

Finally, it was not correct to state that 'The defendants have been charged under both Counts ...' (emphasis added).

The Judgment did qualify the concept of the alleged conspiracy to some degree. It was stated (p. 43):

Conspiracy is not defined in the Charter. But in the opinion of the Tribunal the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action. The Tribunal must examine whether a concrete plan to wage war existed and determine the participants in that concrete plan. ... the evidence established, with certainty the existence of many separate plans rather than a single conspiracy embracing them all.

Finally, the Tribunal stated its important conclusion, which, as a matter of construction (see Chapter 8), was patent: the Charter did not define 'as a separate crime any conspiracy except the one to commit acts of aggressive war' [more accurately, 'for the accomplishment' of crimes against peace, as defined in Article 6 (a)]. The Judgment continued:

The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war. [It should be noted that the words 'or a war in violation of international treaties, agreements or assurances'—Article 6 (a) of the Charter—were omitted from the preceding sentence, despite the fact that the latter category of crimes was included disjunctively in the definition of 'crimes against peace' in Article 6 (a)].

The submission is made respectfully that the delineation of the 'Law as to the Common Plan or Conspiracy' (pp. 42-44 of the Judgment) was not cohesive and highlights the problems of interpretation, and also in respect of the indictment, which the Tribunal recognised.

The Judgment is in striking contrast with that of the Tribunal in the 'High Command Case', some detail of which is cited in Chapter 13.<sup>36</sup>

In the available literature there is little concentration on the strictly legal significance of the inclusion of the conspiracy Count in the indictment. But Professor Brownlie has said:<sup>37</sup>

... planing and preparing for specific wars of aggression or, in some cases, holding high office with knowledge of aggressive plans, led to conviction [of eight accused] on Count One. This being so there would seem to be no reason why the responsibility could not have been adequately assessed as preparation and planning under Count Two. The conspiracy Count was superfluous and led to criticism of the notion of conspiracy as applied by the prosecution and the Tribunal, in spite of the fact that the Tribunal applied a very narrow test of responsibility.<sup>38</sup> (emphasis added)

The validity in law and the strategical prudence of including the conspiracy Count will be further considered in Chapter 18.

## THE LAW RELATING TO WAR CRIMES

The I.M.T. experienced no difficulty in its exposition of the law relating to 'war crimes', but was careful not to express opinions outside the strict scope of Count 3 of the indictment, despite the inclusion in that Count of allegations of a common plan or conspiracy to commit 'war crimes'.

The Tribunal again recognised that it was bound by the definition in Article 6 (b) of the Charter as to what constituted 'war crimes', which it stated were already recognised as war crimes under international law; (Articles 46, 50, 52 and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929). The Tribunal stated (p. 64):

That violations of those provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument.

Two arguments of a technical nature that the Hague Convention was not applicable were summarily dealt with by the Tribunal ruling that it was not necessary to decide them. 'By 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter' (p. 65).

In its treatment of the facts relating to war crimes, the Tribunal was in an impregnable position. It stated (p. 44):

The evidence relating to war crimes has been overwhelming, in its volume and its detail. It is impossible for this argument adequately to review it, or to record the mass of documentary and oral evidence that has been presented. The truth remains that war crimes were committed on a vast scale, never before seen in the history of war ... war crimes were committed when and wherever the Fuehrer and his close associates thought them to be advantageous. They were for the most part a result of cold and criminal calculation.

... when planning to exploit the inhabitants of the occupied countries for slave labour on the very greatest scale, the German Government conceived it as an integral part of the war economy, and planned and organised this particular war crime down to the last elaborate detail.

Other war crimes, such as the murder of prisoners of war who had escaped and been recaptured, or the murder of Commandos or captured airmen, or the destruction of the Soviet Commissars, were the result of direct orders circulated through the highest official channels.

The Tribunal stated (p. 45) that it 'proposed to deal quite generally with the question of war crimes, and to refer to them later when examining the responsibility of the individual defendants in relation to them'.

In the relevant section of the Judgment relating to the facts which it found established (pp. 44-64), the Tribunal dealt with most of the allegations in Count 3 of the indictment under the following headings:

Murder and Ill-Treatment of Prisoners of War;

Murder and Ill-Treatment of Civilian Population;

Slave Labour Policy; and



### Persecution of the Jews.

The Tribunal did not follow the normal practice of making determinations in accordance with the ten categories of war crimes set forth in the very detailed particulars under Count 3. It is therefore difficult to analyse the judgment against the background of the pleaded facts and in accordance with the phrase of American and English jurisprudence: secundum allegata et probata.<sup>39</sup>

The Tribunal summarised its findings under Count 3 in these terms (p. 45):

Prisoners of war were ill-treated and tortured and murdered, not only in defiance of the well-established rules of international law, but in complete disregard of the elementary dictates of humanity. Civilian populations in occupied territories suffered the same fate. Whole populations were deported to Germany for the purposes of slave labour upon defence works, armament production and similar tasks connected with the war effort. Hostages were taken in very large numbers from the civilian populations in all the occupied countries, and were shot as suited the German purposes. Public and private property was systematically plundered and pillaged in order to enlarge the resources of Germany at the expense of the rest of Europe. Cities and towns and villages were wantonly destroyed without military justification or necessity.

Those findings are significant in the elaboration in Chapter 18 of the suggested alternatives for dealing with German war criminals.

Eighteen accused were indicted under Count 3 and sixteen were convicted. The four not charged were Streicher, von Shirach, Schacht and von Papen. Streicher was sentenced to death by hanging for crimes against humanity; von Shirach was sentenced to imprisonment for twenty years, also for crimes against humanity. Schacht and von Papen were acquitted of all charges. Of the sixteen accused who were convicted under Count 3, eleven were sentenced to death by hanging. Further reference to the significance of these statistics will be made in Chapter 18.

### THE LAW AS TO CRIMES AGAINST HUMANITY

All defendants were actually charged (Count 4) with crimes against humanity except Raeder, Doenitz, Schacht and von Papen.<sup>40</sup> However, Count 4 of the indictment began with the words 'All the defendants committed Crimes against Humanity ...'. The allegation of a common plan or conspiracy again was expressly incorporated in Count 4. Significantly, it also was pleaded that 'the prosecution will rely upon the facts pleaded under Count Three as also constituting Crimes against Humanity' (emphasis added). Some detailed particulars were pleaded under Count 4, but were repetitive of, or cumulative upon, the particulars under Count 3. They were also expressed descriptively in some cases, and phrases such as 'As above stated' and 'under paragraph VIII (A) above' were used.

In an analysis of the law relating to crimes against humanity as pronounced by the I.M.T., the following statement by Brigadier General Taylor<sup>41</sup> provides a succinct and convenient summary, which is adopted:

In this section, too, the Tribunal dealt summarily (and, in the writer's view, unsatisfactorily) with the concept of 'crimes against humanity'. The laws of war are operative only in wartime; to what extent do atrocities committed in peace-time constitute offenses against international law? Under what circumstances are atrocities committed within the boundaries of a single nation--such as the prewar persecution of Jews, Gypsies, and others by the Nazis--matters of international judicial concern? These nettles the court did not grasp. An avenue of escape was found in the language of the Charter:

The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime [that is, as declared a crime by Article 6 (c) of the Charter under the description of 'crimes against humanity' either 'before or during the war']. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter. ...

After the outbreak of war, however, the atrocities were clearly committed in connection with aggression and therefore were within the IMT's jurisdiction:

... insofar as the inhumane acts charged in the indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.

In short, atrocities committed during the war by Germans against Germans, or against nationals of the "satellite" allies of Germany (such as Hungary and Rumania), although not in violation of the laws of war (which apply only between belligerents), were given international juridical recognition as crimes against humanity. Atrocities committed prior to the war, however shocking were declared, under the language of the Charter, to be beyond the IMT's judicial pale.

From a strictly legal viewpoint, the Tribunal's decision to convict some defendants on both Counts 3 and 4, essentially on the same facts, is uestionable, even though the facts did theoretically justify a conviction on each Count ex nomine, by virtue of the provisions of Article 6 of the Charter.

The basic principle of English law, of which the English judges and prosecuting counsel must have been completely aware, has been thus expressed:<sup>42</sup>

Where an indictment contains alternative Counts, if the jury convict on one Count, they should be discharged from giving a verdict on the other.

and

Where two charges arising out of the same incident have been preferred and one of them has merged, as it were, into the other, it is not proper that it should be left open to the jury to convict on both charges.

It is the practice in Australia for a judge to direct a jury, in a case in which the accused is charged with two Counts, each of which is a separate substantive crime, but both charges arise out of the same facts, that it would convict (unless it acquits on both Counts) on one or the other according to its view of the evidence, but not on both.

In the reasons for judgment in respect of each defendant charged under both Counts 3 and 4, the evidence relating to war crimes (Count 3) and crimes against humanity (Count 4) was considered together. The same joint heading was used in all such cases: 'War Crimes and Crimes against Humanity', except in the cases of Seyss-Inquart and von Neurath. In each of those cases, which involved all four Counts, there were convictions on both Counts Three and Four, and the evidence was analysed as a whole, with the heading 'criminal activities ...' used in each

case. No attempt was made in the relevant cases—even though the scope for differentiation in accordance with the principle stated above was limited-- to assign guilt in relation to specific acts charged under one or other of the two counts.

## THE LAW RELATING TO THE GROUPS AND ORGANISATIONS NAMED AS CRIMINAL

In Chapter 8, some details have been stated relating to the novelty, scope and consequences of the provisions of Articles 9, 10 and 11 of the Charter, concerning what are commonly referred to as the 'indicted organisations'. In this section of this chapter attention will be focussed only on the judgment of the Tribunal; comment will be made in Chapter 18 with respect to the whole concept of this part of the indictment.

The I.M.T. was at pains to make it manifest that it appreciated the significance of the character of the discretion vested in it by the relevant Articles.<sup>43</sup>

There can be no criticism of the I.M.T. for its approach to the 'novel' criminal process upon which the Charter required it to embark. The decision that it should do so was an executive one, characterised by political determination to destroy the organisational structures which had constituted the 'central core' of the alleged common plan or conspiracy.

The I.M.T. was careful to mitigate the possible harsh consequences of a declaration of criminality and to make recommendations of an ameliorative character, as shown by the extracts from the Judgment cited in Chapter 9.

Nor can there be any valid criticism of the actual decisions in the individual cases. Of the 'indicted organisations' named in the indictment, declarations of criminality (with or without qualifications) were made in respect of the Leadership Corps of the Nazi Party, the Gestapo and SD (both considered together) and the SS. No such declaration was made, however, in relation to the SA, the Reich Cabinet or the General Staff and High Command. It is submitted that the reasoning in all six cases cannot be impugned.

## THE FINDINGS IN RESPECT OF INDIVIDUAL ACCUSED

It would not serve any purpose sought to be achieved by this study to canvass the cases of all twenty two accused who stood trial. In many cases, guilt in terms of the Charter was established beyond any possible doubt; in a small number of cases the decisions were borderline.

Since Brigadier General Taylor was one of the American Associate Trial Counsel, his views should be repeated:<sup>44</sup>

The concluding portion of the judgment, dealing with the guilt or innocence of the individual defendants, is perhaps the least satisfying part of the opinion. The decision in each case required that the general principles laid down earlier in the judgment be interpreted and applied to a particular set of facts established by the proof. With twenty two such sets, some of which presented very delicate problems, the I.M.T. was unable to avoid a number of pitfalls, and troublesome inconsistencies are readily apparent.

The central feature of the Judgment is the deliberate decision of the Tribunal that the charges under Count 2 (wars of aggression) should have precedence over the dubious allegation of conspiracy under Count 1. The statistics presented previously in this chapter reflect that decision.

The hard-line Soviet attitude found expression in the dissenting opinion of the Soviet member of the Tribunal,

Major General Jurisprudence Nikitellenko, in respect of the acquittal of Schacht, von Papen and Fritzsche, the sentence of life imprisonment imposed on Hess, and the decisions not to declare criminal the Reich Cabinet and the General Staff and High Command. The reasoning of Major General Nikitchenko was expressed logically and in detail. It is an example of the manner in which Anglo-American juries often are unable to agree with respect to the facts of a case, subject to the law as judicially directed. There could be no valid criticism of the Russian dissent.

In the opinion of the writer, the most controversial statement in the Judgment concerned the accused Speer, who was acquitted under Counts 1 and 2, but was convicted of Counts 3 and 4 and sentenced to imprisonment for twenty years, a sentence which he served in full. The Tribunal stated (at p. 122)

The Tribunal is of opinion that Speer's activities do not amount to initiating, planning, or preparing wars of aggression or conspiring to that end. He became the head of the armament industry well after all the wars had been commenced and were under way. His activities in charge of German Armament Production were in aid of the war effort in the same way that other productive enterprises aid in the waging of war; but the Tribunal is not prepared to find that such activities involve engaging in the common plan to wage aggressive war as charged under Count 1 or waging aggressive war as charged under Count II.

The Tribunal, having found Speer guilty under Counts 3 and 4, set out in its judgment (at p. 124) mitigating circumstances on which it based its sentence. A consideration of the transcript of Speer's evidence affords an insight into his high intellectual capacity. He obviously impressed the Tribunal with his proclaimed sincerity. The Russian representative did not dissent.

The Judgment bore the stamp of many pens. It lacked the imprint of juridical sagacity. It unnecessarily attempted to defend some of the provisions of the London Agreement and Charter. These, and other, aspects of the Judgment will be discussed in Chapter 18.

## NOTES

1. The Judgment (with the dissenting opinion of the Soviet member) is set forth in the document Cmd. 6964, His Majesty's Stationery Office, London. It is hereafter cited as 'I.M.T. Judgment'. The following footnote 30 at p. 262 in the monograph by Brigadier General Taylor (see Chapter 8, note 18) is of interest: 'Following the practice of many American appellate tribunals, the United States member and alternate equipped themselves with legal assistants of very high calibre. A large share of credit for the judgment should be given to the able supporting work of these assistants, among them Professor Quincy Wright of the University of Chicago, Herbert Wechsler, former Assistant Attorney General and Professor of Law, at Columbia University, James H. Rowe, former Assistant to the Attorney General, and Capt. Adrian L. Fisher, now General Counsel of the Atomic Energy Commission. Lt. Col. A.M.S. Neave, B.A.O.R., of the Tribunal's Secretariat, also made a significant contribution.' (Lt. Col. Neave was the author of Nuremberg ; A Personal Record of the Trial of the Major Nazi War Criminals in 1945-6, Hodder and Stoughton, London, 1978.)
2. The expression 'Nazi Party' is used to designate compendiously the political parties of which Hitler was the leader, and special bodies affiliated with them, commencing with the German Labour Party (1920), followed by the National Sozialistische Deutsche Arbeiter Partei (NSDAP) (1921).
3. See Archbold, Criminal Pleading, Evidence and Practice, 41st edn., p. 867. The scope of this principle was considered by the Judicial Committee of the Privy Council in R. v. Ratten (1971) A.C., 378: 'In the context of the law of evidence, the expression res Restae may be used ... when a situation of fact (e.g. a killing) is being considered, the question may arise: When does the situation begin and when does it end? It may be artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing, in a broader sense, what was happening'. See also O'Leary v. R., (1946) 73 C.L.R. 566; R. v. Bastin, (1971) Crim. L.R. 529.
4. For example, in the judgment against Raeder, the Tribunal said (p. 111): 'He admits the Navy violated the Versailles Treaty, insisting it was, "a matter of honour for every man" to do so, and alleges that the violations were for the most part minor and Germany built less than her allowable strength'.
5. See the references in individual cases discussed in Chapter 13.
6. Oppenheim, International Law, vol. II, 7th edn., 1952 (Lauterpacht, ed.), Chapter VI, Part IV, pp. 566-587. (See the review of this edition by F.A. Mann in (1952) 29 B.Y.I.L., Reviews of Books, pp. 515-517).
7. Ibid., pp. 579-581.
8. Ibid., p. 581, footnote 1.
9. Ibid., pp. 585-586.
10. Ibid., pp. 177-197.
11. Ibid., pp. 579-580, footnote 5.
12. Taylor, op. cit., pp. 263-264.
13. Calvocoressi, Nuremberg, the Facts, the Law and the Consequences, Chatto and Windus, London, 1947, pp. 30-44.
14. Brownlie, International Law and the Use of Force by States, Oxford Clarendon Press, 1963, pp. 167-194

and pp. 195-213.

15. Morgan, formerly Deputy Adjutant-General and Vice-Chairman of the British Government 'War Crimes' Committee of 1918-1919, The Great Assize, London, 1948.
16. Ibid., Preface, pp. iv to vii.
17. Ibid., pp. 6-7.
18. See Articles 1 and 13 of the Allied Declaration of 5 June 1945, Cmd. 6648.
19. (1774) 1 Cowp 204.
20. Morgan, op. cit., p. 7, footnote: "The use of the word "international" ..., as also in the London Agreement, is questionable. The "Agreement" was the agreement of only four Powers, the British Government, the U.S.A., the Provisional Government of France, and the Soviet Union, i.e. the belligerent Powers, although it provided by Article 5 that any Government might subsequently "adhere" to it. I submit that the words used in Article 227 of the Treaty of Versailles and elsewhere therein, namely an "Inter-Allied" Tribunal, would have been more accurate. The words "international" and "military" are almost, if not quite, mutually exclusive and present an unprecedented conjunction'. However, in the writer's view, the word 'international' does not, in the context, necessarily connote universality .
21. The Charter and Judgment of the Nurnberg Tribunal: History and Analysis, Memorandum submitted by the Secretary-General, United Nations -- General Assembly, International Law Commission, New York, 1049, pp 37-38.
22. Glueck, War Criminals : Their Prosecution and Punishment, Alfred Knopf, New York, 1944, pp. 37-69.
23. Woetzel, The Nuremberg Trials in International Law, Stevens & Sons Limited, London, 1962.
24. Ibid., p. 170.
25. Ibid., pp. 82-83.
26. The decision of the Privy Council in Schiffahrt-Treuland, G.m.b.H., and others v. H.M. Procurator-General (1953) 1 All. E.R. 364 has been relied on for this proposition; (Woetzel, op. cit., p. 80). However, the decision is of limited application. The case was an appeal from the Britisi Prize Court. Nevertheless, the following extract from the headnote of the report of the case is relevant 'Although the German High Command surrendered unconditionally all , forces under their control on land, at sea and in the air by the Act of Military Surrender of May 8, 1945, there was no surrender of the German government or Reich itself. It was the Declaration of Berlin on June 5, 1945, which terminated hostilities and ended the right of seizure in prize, because it was not till that date that the passive submission of Germany to the will of the Allies became an accomplished fact'. The writer questions the relevance of prize law to the discrete area of war crimes.
27. Woetzel, op. cit., p. 84.
28. Wright, (1947) 41 A.J.I.L., p. 51.
29. Ibid., footnote 44.
30. Finch, (1947) 41 A.J.I.L., pp. 20-37.
31. Ibid., p. 28.

32. Ibid., pp. 29-34.
33. Jescheck, E.P.I.L., vol. 3, p. 52.
34. History of U.N.W.C.C., pp. 260-261.
35. See Tutorow, War Crimes, War Criminals, and War Crimes Trials, Annotated Bibliography and Source Book, Greenwood Press., New York, 1986, passim.
36. Reference also should be made to the judgment of the tribunal in the 'Justice Case' in the 'Subsequent Proceedings' (see Chapter 13 and the extracts from the judgment cited therein).
37. Brownlie, op cit., p. 201.
38. cf. Wright, (1947) 41 A.J.I.L., pp. 67-69. And see Leventhal et al., (1946-47) 60 Harvard L.R., pp. 857-906, in which the authors state that the conviction of eight of the twenty two accused under Count 1 was 'the most significant achievement of the Nuernberg verdict'.
39. Black's Law Dictionary, 4th ed., p. 1521.
40. See I.M.T. Judgment relating to those four accused.
41. Taylor, op. cit., pp. 265-266.
42. Archbold, op.cit pp. 458-459. As illustrations of the principle; see R. v. Seymour 38 Cr. App. R. 68; R. v. Harris 53 Cr. App. R. 376, in which the Court said: 'It does not seem to this Court right or desirable that one and the same incident should be made the subject matter of distinct charges, so that hereafter it may appear to those not familiar with the circumstances that two entirely separate offences were committed. Were this permitted generally, a single offence could frequently give rise to a multiplicity charges and great unfairness could ensue'. And see Watson and Purnell, Criminal Law in New South Wales, vol. 1, p. 167.
43. I.M.T. Judgment, pp. 66-67: The effect of the declaration of criminality by the Tribunal is well illustrated by Law Number 10 of the Control Council of Germany passed on the 20th day of December, 1945, which provides:

'Each of the following acts is recognised as a crime:

...

(d) Membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal.

(3) Any person found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the Tribunal to be just. Such punishment may consist of one or more of the following:

(a) Death.

(b) Imprisonment for life or a term of years, with or without hard labour.

(c) Fine, and imprisonment with or without hard labour, in Lieu thereof.'

In effect, therefore, a member of an organisation which the Tribunal has declared to be criminal may be subsequently convicted of the crime of membership and be punished for that crime by death. This is not

to assume that international or military courts which will try these individuals will not exercise appropriate standards of justice. This is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice.

Article 9, it should be noted, uses the words 'The Tribunal may declare' so that the Tribunal is vested with discretion as to whether it will declare any organisation criminal. This discretion is a judicial one and does not permit arbitrary action, but should be exercised in accordance with well settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided. If satisfied of the criminal guilt of any organisation or group, this Tribunal should not hesitate to declare it to be criminal because the theory of 'group criminality' is new, or because it might be unjustly applied, by some subsequent tribunals. On the other hand, the Tribunal should, make such declaration of criminality so far as possible in a manner to insure that innocent persons will not be punished.

44. Taylor, *op. cit.*, p. 268.



## CHAPTER 12 THE DEFENCE OF SUPERIOR ORDERS

### INTRODUCTION

The concept of respondeat superior as a defence to a criminal charge is disparate from any issue which may arise concerning the jurisdiction of the tribunal before which the trial takes place. However, in a study of the jurisdictional basis of the Nuremberg trial the plea of obedience to superior orders has some relevance, at least indirectly, for a number of reasons.

First, it is relevant to a consideration of the London Agreement and Charter. Article 8 of the Charter negated, so far as responsibility was concerned, the applicability of the plea of respondeat superior without any qualification and confined its relevance to the possible mitigation of punishment.

Second, many of those accused at Nuremberg expressly relied on the defence and in the course of the trial questions arose concerning the evidentiary basis for reliance on the plea as well as the legal effect of Article 8 of the Charter. By this confluence of factual and legal issues, one element of the question of procedural fairness was forged.

Third, the United Nations General Assembly, at its 55th plenary meeting on 11 December 1946, in resolution 95 (I), unanimously affirmed 'the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'.<sup>1</sup> Irrespective of the status in international law of such an affirmation, it did in fact amount to a unanimous endorsement of the Nuremberg judgment insofar as the Tribunal went beyond Article 8 of the Charter and made some general pronouncements concerning the doctrine of respondeat superior (see later in this chapter).

Fourth, in his Report to the President of the United States of America in June 1945, Mr. Justice Jackson, Chief of Counsel for the United States, anticipated the significance of the plea of superior orders in the forth-coming trials when he said:<sup>2</sup>

With the doctrine of immunity of a head of state usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility. There is doubtless a sphere in which the defense of obedience to superior orders should prevail. If a conscripted or enlisted soldier is put on a firing squad, he should not be held responsible for the validity of the sentence he carries out. But the case may be greatly altered where one has discretion because of rank or the latitude of his orders. And of course, the defense of superior orders cannot apply in the case of voluntary participation in a criminal or conspiratorial organization, such as the Gestapo or the S.S. An accused should be allowed to show the facts about superior orders. The Tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no weight at all. (emphasis added)

Some writers appear to have overlooked the fact that the last sentence of the extract cited from the Jackson Report expressly recognised that he then considered that the plea of respondeat superior essentially involves factual issues, the resolution of which may establish a complete defence.<sup>3</sup>

However, the significant point is that in the interval between the time of his Report to the President and the commencement of the trial, 'a new leaf was turned'.<sup>4</sup> In his opening speech, Jackson emphasised that under Article 8 of the Charter, in the formulation of which he had been involved, no defence based on obedience to orders could be entertained, although in the following passage he introduced a qualification, but without being specific except in the case of a firing squad:<sup>5</sup>

Of course, we do not argue that the circumstances under which one commits an act should be

disregarded in judging its legal effect. A conscripted private on a firing squad cannot expect to hold an inquest on the validity of the execution. The Charter implies common sense limits to liability, just as it places common sense limits upon immunity.

The significance of that qualification, especially the reference to 'implications' in the Charter, will be considered later in this chapter.

## CONFLICTING DOCTRINES : SUGGESTED SOLUTIONS

### The doctrine of respondeat superior

Expressed to its full extent, the doctrine of respondeat superior means that a member of the armed forces of a country who commits a war crime in obedience to the order of a hierarchical superior is automatically relieved of responsibility, unconditionally and without qualification. The superior alone bears the responsibility.

Decided cases and the writings of learned authors in the present century some of which are discussed in this chapter, justify the assertion that the doctrine has little modern support, especially since the Nuremberg judgment. I prefer to explain the shift in adherence to the doctrine on the basis of a realisation, seldom actually expressed, of the enormity of the crimes to which attempts were made to apply it at Nuremberg, rather than to acknowledge that it has been due to an acceptance of the legal reasoning expressed in the Nuremberg judgment in so far as the reasoning went beyond the 'decisive and binding' effect of Article 8 of the Charter.

In contrast to the principle of respondeat superior, a number of other doctrines had been advocated prior to the Nuremberg trial, some of the more popular of which will be considered in this section.<sup>5a</sup>

### The theory of absolute liability

Professor Dinstein has expressed the theory of absolute liability in the following terms:<sup>6</sup>

The doctrine of absolute liability, or as the French term it rather derisively, les baionnettes intelligentes, ... in accordance with which a soldier must examine and weigh every superior order that is given to him ... has been advocated and sometimes gained acceptance. If it is an order to perform a criminal act, he must refuse to carry it out, and it is impossible to punish him for the refusal. If he obeys the order, he does so at his own risk. The fact of obedience to orders will not save him from criminal conviction.

The first two theories appear diametrically opposed, although Professor Dinstein claims that 'neither "solution" overcomes the dilemma' [that is, of the individual serviceman] because 'the first doctrine is incompatible with the interests of criminal law, the second is inconsistent with the demands of military discipline'.<sup>7</sup>

It should be noted that it is not universally accepted that there necessarily is conflict between the first two doctrines. For example, Professor Johnson, then Challis Professor of International Law at the University of Sydney, stated:<sup>8</sup>

A curious provision in Queen's Regulations and Orders in Canada (Chapter 19) lays down that 'every officer and man shall obey the orders of officers and men who are senior to him', but goes on to say that 'if an officer or man is given an order that he considers to be in conflict with the National Defence Act, QR and O, or general or particular orders binding on him, he shall point out the conflict orally, or in writing if the order does not require immediate obedience, to the superior by whom the order was given. If the superior still directs him to obey the order, he shall do so'. Whoever drafted this

provision was clearly doing so in an attempt to resolve Professor Dinstein's dilemma, and doing so in a manner which may be considered appropriate to an army in a democratic country in the present age. Whether such a system would be feasible on active service is open to doubt. For it would be a mistake to assume that the principle of military discipline and the principle of compliance with rules of international law are necessarily in conflict. Indeed situations may arise in which there is a conflict, but in general, as is quite clear from the Hague Regulations and other enactments, international law relies heavily on military discipline for the enforcement of its rules.

### The 'manifest illegality principle'

In an attempt to devise a compromise between the two opposing extreme doctrines, there emerged a principle which Professor Dinstein terms 'the manifest illegality principle'; that is, that 'the general rule is that a soldier committing an offence in obedience to superior orders is relieved of his responsibility for his wrongdoing. If, however, the illegality of the order is clear on the face of it, that is, manifestly and palpably, the soldier must refuse to obey it or else pay the penalty'.<sup>9</sup>

Professor Dinstein finds support for the principle in a provision of the Criminal Code Ordinance 1936 of Israel, s. 19 (b) of which states:

A person is not criminally responsible for an act or omission if he does or omits to do the act under any of the following circumstances, that is to say:

- (b) in obedience to the order of a competent authority which he is bound by law to obey, unless the order is manifestly unlawful.<sup>10</sup>

The connotation of the word 'manifestly' in that statutory context was explained in the judgment of the Israel District Military Court in the Kafr Kassem Case (first instance) in these terms:<sup>11</sup>

The distinguishing mark of a 'manifestly unlawful' order should be displayed like a black flag over the order given, as a warning reading 'Prohibited!' Not formal unlawfulness, hidden or half-hidden, not unlawfulness which is discernible only to the eyes of legal experts is important here, but a conspicuous and flagrant breach of the law, a certain and imperative unlawfulness appearing on the face of the order itself, a clearly criminal character of the order or of the acts ordered, an unlawfulness which pierces the eye and revolts the heart, if the eye is not blind and the heart not obtuse or corrupted—that is the extent of 'manifest' unlawfulness required to override the duty of obedience of a soldier, and to charge him with criminal responsibility for his acts.

The Military Court of Appeal referred to that passage as 'striking' and 'deserving to be heeded and remembered'; further, it said that 'the manifest illegality principle' is 'something like a golden mean', as well as 'the best attainable'.<sup>12</sup>

### Some judicial consideration of the 'manifest illegality' principle

The circumstances in which the German Supreme Court (Reichsgericht) tried alleged war criminals in Leipzig after World War I are well known and have frequently been stated in works relating to the doctrine of respondeat superior. By Article 228 of the Treaty of Versailles, the Allied Powers had authority to bring German war criminals to trial and the German Government was required to surrender the accused. It refused to do so on

the ground that it feared the consequences of the reaction of the German population to such action. The political compromise was that the German Supreme Court would try German alleged war criminals.

Professor Dinstein has discussed a number of such cases, in which 'the Court tackled the question of obedience to orders'.<sup>13</sup>

The case of Robert Neumann.<sup>14</sup> The case is of doubtful relevance. The accused, a trained soldier, was charged on 17 counts of physical illtreatment of British prisoners during 1917 and on one count of insulting a prisoner, in breach of the Military Penal Code and the Imperial Penal Code. One charge only is apposite in this context. The facts as found by the Court were as follow. Some 24 prisoners on night shift deliberately refused to work. In order to compel obedience, a non-commissioned officer, acting on the instructions of the camp commandant, ordered the sentries 'to fall in and attack'. This order was carried out by the use of rifle butts. Some prisoners were wounded. The accused participated in the attack. He fell on one prisoner, and belabored him with fists and feet. In reasons expressed in less than half a page, the Court held that the accused was not responsible for the events: 'He was covered by the order of his superior, which he was bound to obey. According to s. 47 of the Military Penal Code a subordinate can only be criminally responsible under such circumstances, when he knows that his orders involve an act which in civil or military crime. This was not the case here. ... As matters stood there could be no doubt of the legality of the order. Unless there is to be irreparable damage to military discipline, even in a body of prisoners disorderly tendencies have to be nipped in the bud relentlessly and they have to be stamped out by all the means at the disposal of the commanding officer and if necessary even by the use of arms.'

Unlike Professor Dinstein,<sup>15</sup> I do not consider that this case in any significant way illuminates the 'manifest illegality' principle, in particular the criteria for determining whether or not an order is 'manifestly' illegal. The Court simply ruled that the order was, in the circumstances, legal. Consequently it acquitted the accused.

The 'Dover Castle' Case.<sup>16</sup> The accused, a First Lieutenant in the German Navy, was a submarine commander. He was charged with having torpedoed the English hospital ship Dover Castle without warning and with having sunk her with exceptional brutality. Six men were killed. The accused admitted the basic facts, but pleaded that he merely carried out an order of the German Admiralty, his superior authority. The German Government had claimed that enemy governments were using hospital ships for military purposes in breach of the 10th Hague Convention. According to the judgment of the Court, the German Government 'gave proof in support of its assertions'. The German Admiralty gave written notice in two memoranda of its intention to take reprisals: '... enemy hospital ships in the Mediterranean would be regarded as vessels of war and forthwith attacked'. Accordingly, the German Admiralty issued an order that, subject to certain exceptions which are not relevant, 'every hospital ship on the routes; named is to be attacked forthwith'. The order was communicated to the accused. Previously the two memoranda had been brought to his attention.

In its judgment the German Supreme Court said:<sup>17</sup>

It is a military principle that the subordinate is bound to obey the orders of his superiors. This duty of obedience is of considerable importance from the point of view of the criminal law. Its consequence is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible.

This is in accordance with the terms of the German law, s. 47, para. I of the Military Penal Code. It also accords with the legal principles of all other civilized states. ...

The Admiralty Staff was the highest service authority over the accused. He was in duty bound to obey their orders in service matters. So far as he did that, he was free from criminal responsibility. Therefore he cannot be held responsible for sinking the hospital ship Dover Castle according to orders.

Under s. 47 of the Military Penal Code quoted above, there are two exceptional cases in which the question of the punishment of a subordinate who has acted in conformity with his orders can arise. He can in the first place be held responsible if he has gone beyond the orders given him. In the present

case the accused has not gone beyond his orders.

According to s. 47 of the Military Penal Code No. 2, a subordinate who acts in conformity with orders is also liable to punishment as an accomplice, when he knows that his superiors have ordered him to do acts which involve a civil or military crime or misdemeanor. There has been no case of this here.

The judgment is open to the criticism that it expounded principles which were extraneous and thereby introduced unnecessary complications. In the extract cited above there are passages which, on the facts so clearly established, were obiter.

Again, the Dover Castle Case is not an illustration of the general rule that 'a subordinate, committing an offence in obedience to superior orders does not incur criminal responsibility'<sup>18</sup> nor does the case involve the doctrine of respondeat superior. The Court found that the accused believed the reprisal was legitimate. It is implicit in the judgment that the Court considered, on the evidence, that it was in fact legitimate. Therefore there was no 'crime'. As was stated in the judgment in the 'Einsatzgruppen Case', one of the twelve 'Subsequent Proceedings' conducted at Nuremberg in the years 1946-49, 'Unless it is established that the deed in question is a crime, then naturally there needs to be no explanation for its commission'.

The 'Llandovery Castle' Case. Despite the extensive bibliography relating to this case<sup>19</sup> and the detailed analysis of the judgment by Professor Dinstein,<sup>20</sup> I consider the case has been widely misunderstood and that it represents a simple and uncomplicated application of well-settled law. Indeed a distinctive feature in that the two German naval officers who were charged with homicide were convicted only as accessories to acts of killing by another.

The following facts were found established by the German Supreme Court. Until 1916 the steamer Llandovery Castle had been used for the transport of troops. In that year she was commissioned by the British Government to carry wounded and sick Canadian soldiers home to Canada from the European theatre of war. Thereafter she was exclusively used for the transport of sick and wounded. She never again carried troops and never had taken munitions on board. At the end of June 1918 the vessel was on her way back to England from Halifax after having carried sick and wounded there. In the evening of 27 June 1918 the steamer was sunk in the Atlantic Ocean by a torpedo fired from a German U-boat, the commander of which was First Lieutenant Patzig. Subsequently he was promoted captain. At the time of the trial his whereabouts were unknown. Of those on board the vessel-- crew, medical personnel and nurses--234 were drowned and only 24 were saved.

The accused Dithmar was the first officer of the watch and the accused Boldt the second. In accordance with international law, German U-boats were forbidden to torpedo hospital ships, to which category the Llandovery Castle belonged. The German Naval Command had given orders that hospital ships were only to be sunk within the limits of a certain barred area. 'However', it was stated in the judgment, 'this area was a long way from the point we have now under consideration. Patzig knew this and was aware that by torpedoing the Llandovery Castle he was acting against orders. But he was of the opinion, founded on various information ... that, on the enemy side, hospital ships were being used for transporting troops and combatants, as well as munitions. He, therefore, presumed that, contrary to international law, a similar use was being made of the Llandovery Castle. In particular, he seems to have expected ... that: she had American airmen on board. Acting on this suspicion, he decided to torpedo the ship, in spite of his having been advised not to do so by the accused Dithmar [and a witness].'

The vessel sank in about 10 minutes. Some lifeboats were successfully lowered. However, the 24 occupants of one lifeboat were the only survivors. None of the other several lifeboats launched was subsequently traced. The Court made a finding that after the torpedoing of the ship 'the lifeboats of the Llandovery Castle were fired on in order to sink them' The judgment stated:<sup>21</sup>

The Court finds that it is beyond all doubt that, even though no witness had direct observation of the effect of the fire, Patzig attained his object so far as two of the boats were concerned... For the firing on the lifeboats only those persons can be held responsible who at the time were on the deck of the

U-boat; namely Patzig, the two accused and the chief boatswain's mate. Patzig gave the decisive order, which was carried out without demur in virtue of his position as commander. ... The act of Patzig is homicide, according to para. 212 of the Penal Code. By sinking the lifeboats he purposely killed the people who were in them. ... The firing on the boats was an offence against the law of nations ... in war at sea, the killing of shipwrecked people, who have taken refuge in lifeboats, is forbidden ... The rule of international law, which is here involved, is simple and is universally known. No possible doubt can exist with regard to the question of its applicability. The Court must in this instance affirm Patzig's guilt of killing contrary to international law. The two accused knowingly assisted Patzig in this killing by the very fact of their having accorded him their support. It is not proved that they were in agreement with his intentions. The decision rested with Patzig as the commander. The others who took part in this deed carried out his orders. It must be accepted that the deed was carried out on his responsibility, the accused only wishing to support him therein. A direct act of killing, following a deliberate intention to kill, is not proved against the accused. They are, therefore, only liable to punishment as accessories. (Para. 49 of the Penal Code).

Patzig's order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation of the law as is punishable, the superior officer issuing such an order is alone responsible. According to No. 2, however, the subordinate obeying such an order is liable to punishment, if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused.

It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law. This happens only in rare and exceptional cases. But this case was precisely one of them, for in the present instance, it was perfectly clear to the accused that killing defenceless people in the life-boats could be nothing else but a breach of the law. As naval officers by profession they were well aware, as the naval expert Saalwachter has strikingly stated, that one is not legally authorized to kill defenceless people. They well knew that this was the case here. They quickly found out the facts by questioning the occupants in the boats when these were stopped. They could only have gathered, from the order given by Patzig, that he wished to make use of his subordinates to carry out a breach of the law. They should, therefore, have refused to obey. As they did not do so, they must be punished.<sup>22</sup>

The correct view of the judgment is that, under German national law, Patzig was guilty of homicide. The two accused were accessories. It is true that they acted under orders, but the Court found that they knew their actions were unlawful under international law. In these circumstances, a verdict of guilty was inevitable, but the criminal liability was imposed by virtue of international law.

The facts of the case were so simply and clearly established that it should not be regarded as authority for any proposition other than adherence, on the facts, to settled legal principle. In particular, it did no more than refer to the 'manifest illegality' principle in a case in which there was a finding of actual knowledge by the accused of the illegality of the acts which were the subject of orders by a superior.<sup>23</sup>

The Stenger and Cruscus Case.<sup>24</sup> The selected list of 45 persons submitted for trial by the German Supreme Court at Leipzig included two German officers, General Stenger and Major Cruscus. General Stenger, Commander of one of the armies in France, was charged with having issued an order that no quarter should be afforded to French prisoners of war. Major Cruscus was charged with having carried out this order, resulting in the murder of large numbers of French prisoners, some of whom he shot with his own revolver. Stenger was acquitted on the basis of the Court's finding that Cruscus had misinterpreted the order given by Stenger. Cruscus was acquitted of most of the charges because of the Court's view that he was not 'master of his nerves'. He was convicted on one charge of manslaughter by negligence, for which the sentence was imprisonment for two years. The public support for the two accused strikingly demonstrated the farcical character of the Leipzig trials.<sup>25</sup> No legal principle should be derived from the cases of Stenger or Cruscus.<sup>26</sup>

Professor Dinstein epitomized what he described as 'a clear-cut and unified approach to the question of obedience

to superior orders' demonstrated by the Leipzig trials~ excluding the Stenger and Cruscus Case, in the form of the following propositions:

- (1) As a general rule, a subordinate committing a criminal act pursuant to an order should not incur responsibility for it.
- (2) This rule is inapplicable if the subordinate knew that the order entailed the commission of a crime and obeyed it nonetheless.
- (3) To determine whether the subordinate was aware of the fact that he had been ordered to perform a criminal act, the Court may use the auxiliary test of manifest illegality.

The first proposition is firmly settled.

I would prefer to combine the second and third propositions and express them thus:-

- (2) This rule is inapplicable either (a) if it is established that the subordinate had actual knowledge that the order entailed the commission of a crime but obeyed it nonetheless (as in the case of the Llandovery Castle) or (b) if such knowledge is imputed to him because the order entailed the commission of an act which was manifestly unlawful but which he obeyed nonetheless.<sup>28</sup>

It should be noted that Professor Dinstein concluded his consideration of the Leipzig trials by stating:

Clearly the Reichsgericht in Leipzig applied and interpreted principles of German national law, and not of international law, in dealing with the problem of obedience to orders. But the Court gave expression to a certain way of solving the problem, and the question that we ought to ask ourselves now is whether the same may also serve the needs of international law.<sup>29</sup>

This question will be considered in the conclusion to this chapter.

### The mens rea principle

Professor Dinstein perceived a possible solution to what he termed 'the quagmire of the problems pertaining to the subject of obedience to superior orders' in the application of the two elements of mistake of law and compulsion.

He did not express any firm view as to whether international law recognised or repudiated the maxim ignorantia juris non excusat. But he asserted that both the fact of obedience to orders and the factor of compulsion could be regarded as factual aspects of another defence--that of mistake of law.

His next step was to reject the doctrine of respondeat superior and the doctrine of absolute liability; further, he rejected 'intermediate solutions which deny to the fact of obedience to orders the status of an automatic a priori defence but nevertheless recognise it as a defence per se under appropriate circumstances'.<sup>30</sup> He continued:<sup>31</sup>

Such intermediate solutions are endorsed by many writers, who contend, expressly or by implication, that obedience to superior orders should be accepted as a defence, though only when the orders involved are not manifestly illegal, or when the offender complying with the orders acts without being aware of the fact that he was ordered to perform an illegal act or when the offender acts under compulsion.

Professor Dinstein then developed his reasoning by equiparating the defence of mistake of fact with mistake of law. In the context of those defences, such equiparation is valid both on principle and by precedent.

Thus Professor Glueck stated:<sup>32</sup>

... The defence of ignorance or mistake of fact is of course also available to soldiers, and might indeed be used often as a device for mitigating the rigors of the superior-orders defence, by using the fact of obedience to orders as a stepping-stone to proof of ignorance or mistake of fact.

And Sir James FitzJames Stephen emphasised the device thus:

... the fact that he did so act, and the fact that the order was apparently lawful are in all cases relevant to the question whether he believed, in good faith and on reasonable grounds, in the existence of a state of facts which would have justified which he did apart from such orders.<sup>33</sup>

There is abundant precedent, arising from trials before military and national courts in a number of countries, that mistake of fact as excluding mens rea, if established to the competent tribunal, entitles an accused person to acquittal. Some of the cases are discussed below.

From a juridical viewpoint an established relevant mistake of fact is part of the totality of the evidence upon which the essential mens rea of the accused is judged. The asserted mistake of fact may be accompanied by a superior order, or even arise out of the form of such an order, but the existence of the combination is not necessary.

The Scuttled U-Boats Case,<sup>34</sup> An engineer officer of a German U-boat, Gerhard Grumpelt, was charged before a British Military Court at Hamburg, Germany, on 12 and 13 February 1946 with the war crime of having scuttled two U-boats which had been surrendered by the German Government to the Allies. He claimed that he was not aware of the terms of the Instrument of Surrender, since these had not been notified to him in any way, and further that he had received intimation that a general order for the scuttling of all U-boats should be put into effect, while at the same time not hearing of any countermanding order, which had in fact been given before the scuttling.

The summing up by the Judge Advocate was to a large extent confined to the facts of the case and centred predominantly around the question of the mens rea of the accused, on which his defence entirely depended.

The Judge Advocate put the issue to the Court in these terms: <sup>35</sup>

Are you satisfied that the man's state of mind at the time in question was this: 'I honestly believed I had an order; I did not know anything about any surrender; it was not for me to inquire why the higher command should be scuttling submarines; I honestly, conscientiously and genuinely believed I had been given a lawful command to scuttle these submarines and I have carried out that command and I cannot be held responsible'. ... The defence suggests if you look at the evidence as a whole that that is a reasonable possibility ... in my view, if the accused did not have any knowledge of those terms [of surrender] and he did believe honestly that he had an order of this kind and that he carried it out ... you will be entitled to acquit him.

The Court rejected the plea of mistake of fact because of its view of the evidence and convicted the accused. The findings were confirmed by higher authority.<sup>35a</sup>

The Almelo trial.<sup>36</sup> The accused were charged before a British military court at Almelo, Holland, on 24-26 November 1945 with war crimes. The accused S1 was in command of a party which killed a British officer prisoner of war and a Dutch civilian who had been living in hiding in a Dutch home. The accused S2 fired the



actual shots, and two other accused H and W assisted. One of the pleas advanced was the absence of mens rea. The evidence in support of the plea was tenuous. It was suggested that the accused could reasonably believe the British officer was a spy, connected with the Dutch underground, and that the Dutch civilian had committed war treason.

In summing up the case, the Judge Advocate said that 'if the Court felt that circumstances were such that a reasonable man might have believed that this officer had been tried according to law, and that they were carrying out a proper judicial legal execution, then it would be open to the Court to acquit the accused'.<sup>37</sup>

In the event, the Court rejected the plea based on the absence of mens rea and all four accused were found guilty.

The trial of Oscar Hans.<sup>38</sup> The case was heard at first instance by the Lagmannsrett in Norway in January 1947. The accused, a member of the SS, had been employed by the Sipo in Oslo and was in charge of death sentences passed by German authorities. He was charged on five Counts of having executed Norwegian patriots; two of the Counts included the execution of Russian citizens. The executions involved in the first two Counts were, it was claimed, acts of reprisal for the killing of two German policemen and for several attempts at sabotage. The executions to which the remaining three Counts related were the result of decisions of the Sipo and were carried out without trial.

The Lagmannsrett acquitted the accused on Count 1 of the Indictment as it was held that at that time the accused may have been in justifiable ignorance of the fact that the executions were decided upon without previous trial. The Court stressed the fact that on that occasion the Untersuchungsfulhrer had attended the execution and had read out the contents of the documents to the victims, a circumstance which might have given the accused the impression that sentence had been passed by the court.

As to Count 2, the prosecution had already before the trial decided to withdraw the charge involved.

The Court acquitted the accused of the execution of the Russian citizens mentioned in Counts 4 and 5, as the accused might have assumed that those sentences had been passed by the Wehrmacht's courts-martial.

As regards the executions of Norwegian victims referred to in Counts 3, 4 and 5 of the Indictment, the Lagmannsrett held that the acts could be regarded as being at variance with the laws and customs of war. The Court thereupon proceeded to examine whether the mental element of crimes had also been present.

The accused said that during his office he had always been aware of the fact that no execution could legally be carried out without a trial. After having heard the evidence submitted to the Court, he realised that some of the executions had in fact been carried out without previous trial. He pleaded, however, that he could not see how he could be held responsible for having acted bona fide on orders of his superiors. He had received the execution orders from the superior personally and they had all stated that the condemned had been 'sentenced' to death. He had been confident that his superior would not give him orders which were in any way contrary to law.

A majority of the Court rejected the plea. Two of the judges dissented and voted for the acquittal of the accused on all Counts.

On appeal to the Supreme Court, which was constituted by nine judges, it unanimously quashed the verdict and sentence. Its basic reason was that the accused could not be found guilty unless it had been shown that he was actually aware that the victims had not been tried and sentenced according to law; constructive knowledge was not sufficient.<sup>39</sup>

It should be noted in the context that although the question of superior orders entered into the trial, it appears that such orders were regarded as relevant only in so far as they created, or helped to create, a mistake of fact in the mind of the accused; the duress aspect of superior orders was not considered by the Supreme Court.<sup>40</sup>

The trial of Karl Buck and Ten Others<sup>41</sup> This trial by a British Military Court at Wuppertal, Germany, on 6-10 May 1946, is relevant to the defence of mistake of fact. Other details have been omitted.

The eleven accused were charged with having committed war crimes by killing ten prisoners of war and four French nationals. The editor of the report included in it the following note;<sup>42</sup>

Counsel acting for the accused in general pointed out that in Germany there had been not only courts-martial but also 'so-called S.S. and police courts for German persons and members of the S.S.'. He claimed that the interrogations of the victims by [a German officer], on whose reports [the executions were ordered], constituted a trial by the Security Police. The accused, he claimed, had had no other information on the matter than that the prisoners had been tried and condemned, and had acted on that assumption. They had 'neither the sense for technicalities nor the mental abilities to look deeper into this case'. The Prosecutor, on the other hand, submitted that the obliteration of all traces of the crime and the steps taken by the accused to suppress all knowledge of the crime belied any contention that they thought that they were performing a legal execution. Lawful executions did not take place in woods, nor were those shot buried in bomb craters with their valuables, clothing and identity markings removed. ... could it have been shown that a bona fide impression had existed in the minds of the accused that the execution was the consequence of a trial in which the victims had been legally condemned to death, the plea of mistake of fact, which the Defence raised, might well have been effective. In the circumstances of the case, however, the Court did not see fit to give effect to it.

The Stalag Luft III Case <sup>43</sup> This notorious case, which involved the execution of 50 escaped Allied officer prisoners, was important in that the defence of the eighteen accused raised the absence of mens rea. It specifically invoked the principle of mistake of fact, in that the accused claimed that they did not realise that the prisoners were prisoners of war but thought that they were spies and saboteurs. The Prosecutor, in his closing address, said that if the Court found that ; the accused acted in such a belief it should acquit them.<sup>44</sup> The plea of the absence of mens rea failed. With one exception, all accused were found guilty of most of the charges. In the exceptional case, the accused was convicted on two Counts.

It must be emphasised, as Professor Dinstein frequently did, that as a defence mistake of fact does not stand apart from the other factual matters and the legal issues which arise in a trial. It is one of the strands woven into the structure of the defence, and takes its place, not in isolation, but as part of the whole.

Professor Dinstein's thesis was that 'the common denominator' of mistake and compulsion is lack of mens rea. He pointed out that the first scholar to pursue this avenue as a touchstone for the establishment of guilt or Innocence in appropriate cases was Lauterpacht, who in 1942 said:

It is necessary to approach the subject of superior orders on the basis of general principles of criminal law, namely, as an element in ascertaining the existence of mens rea as a condition of accountability.

Professor Dinstein referred to a number of authors who had discussed the principle of mens rea in the context of considering the question of the defence of superior orders. <sup>46</sup>

It seems that the basis of his criticism of the treatment of the question of mens rea by those authors was that they were not sufficiently direct and incisive in moulding a defence based on mistake of law or fact or compulsion into the wider fabric of a plea of absence of mens rea. Consequently, Professor Dinstein said:<sup>47</sup>

The rule that ought to be deduced is, in my opinion, as follows: the fact of obedience to orders constitutes not a defence per se but only a factual element that may be taken into account in conjunction with the other circumstances of the given case within the compass of a defence based on the lack of mens rea, that is, mistake of law or fact or compulsion. Only lack, of mens rea, of which obedience to orders constitutes circumstantial evidence, serves to protect from criminal responsibility in this case.

## THE BARREN YEARS: 1919-1945

During the period between 1919 and 1945, the world enjoyed decades of comparative peace, with some exceptions: for example, the Abyssinian war. The politicians became involved with the tangled skein of the defence of superior orders. Bodies such as the Birkenhead Committee, appointed by the British Government in 1918, and the Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties<sup>48</sup> made recommendations which did not illuminate the controversial subject. Nor did the Peace Treaty of Versailles, at least expressly, provide elucidation. The Leipzig trials did crystallise certain principles, as discussed previously. However, the Washington Conference of 1922 proved abortive. A Commission of Jurists, the task of which was confined to the formulation of rules relating to aerial warfare and the use of radio in time of war, recommended that:<sup>49</sup>

Radio operators incur no personal responsibility from the mere fact of carrying out the orders which they receive in the performance of their duties as operators.

The rationale of this recommendation was that 'a radio operator works in a cabin'.<sup>50</sup>

Dinstein's summation of the instruments in the period under review is that 'they do not carry the subject of obedience to orders much further forward'.<sup>51</sup> One is obliged to agree.

### The dawn before the London Agreement and Charter

Even before the Moscow Declaration of 30 October 1943, there were discussions among the Allied Powers concerning the punishment of war crimes and attention became focussed on the defence of superior orders. As stated in footnote 45, in 1942 Lauterpacht submitted a memorandum to a Committee established, by the International Commission for Penal Reconstruction and Development, in which he rejected both the doctrines of respondeat superior and absolute liability and stated:<sup>52</sup>

There ought to be no doubt that should courts entrusted with the trial of war crimes disregard altogether the plea of superior orders, they would be adopting a course which could not be regarded as defensible. On the other hand ... the fact of superior orders need not warp the effectiveness of the law in a manner which may rightly be regarded as a perversion of justice.

The difficulty that I find with Lauterpacht's analysis is that, although he recognised the need to approach the subject of superior orders as an element in ascertaining the existence of mens rea, he did not link the fact of superior orders, as an evidential element, with a plea of a specific defence based on established legal grounds, such as mistake of law or fact or compulsion. The need for such a link to be recognised as a potential basis for acquittal is illustrated by considering a converse situation. A person accused of war crimes may well assert, and prove, that he acted under a mistake of law or fact but nevertheless, on a consideration of the whole of the evidence, the prosecution may well prove that he had the requisite mens rea because of, for example, sadistic reasons, or motives of revenge or any other circumstance which would establish mens rea. It is for this reason that a judge in a criminal trial, in directing a jury on matters of law, must carefully emphasise that its verdict should be based on a consideration of the whole of the evidence and not merely on fragmented parts of it.

It is clear that in the formative period before the London Agreement and Charter, American attitudes to what was perceived would be a crucial matter in the forthcoming trials were clarified. Thus, one proposal was:<sup>53</sup>

The fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute an absolute defense but may be considered either in defense or in mitigation of punishment if

the tribunal before which the charges are being tried determines that justice so requires.

For the purposes of a special conference to be convened shortly afterwards, the American proposal was amended as follows:<sup>54</sup>

In any trial before an International Military Tribunal the fact that a defendant acted pursuant to order of a superior or government sanction shall not constitute a defense *per se*, but may be considered either in defense or in mitigation of punishment if the Tribunal determines that justice so requires.

There was no difference of substance between the two American proposals, each of which was consonant with the 'mens rea principle'. From a different viewpoint, however, each was defective by reason of the use of the words 'if ... justice so requires'. The connotation of the words was metaphysical rather than strictly legal and would have led to dispute as to what, in the circumstances, was the appropriate perception of 'justice'.

We have discussed in this chapter the approach of Mr. Justice Jackson to the defence of superior orders and his ultimate endorsement of Article 8 of the London Charter, on which we shall now focus attention. Undoubtedly the final form of Article 8 was the result of compromise to accommodate the hard-line Russian view that absolute liability so far as guilt or innocence was concerned must be the fundamental principle to be applied, in complete disregard of superior orders. Article 8 provided:

The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

It should be noted at once that the concluding words 'if the Tribunal determines that justice so requires' were unnecessary. Article 16 of the Charter contained provisions 'in order to ensure fair trial for the defendants'. Outstanding jurists such as those who comprised the International Military Tribunal could be expected throughout the trial, in determining guilt or innocence, and particularly in imposing punishment (Article 27 of the Charter), steadfastly to act in accordance with principles of justice. A direction to pay regard to the requirements of 'justice' was gratuitous. But such considerations are not significant. The basic criticism of Article 8 is seen in the comment of Professor Dinstein, which I regard as compelling:<sup>55</sup>

The doctrine of absolute liability was impressively confirmed, within the compass of the Charter, as the proper solution of the problem of obedience to orders. To my mind, this vigorous approach does not rest on solidly logical foundations; and the mere fact that the London Conference decided to draft Article 8 in a certain way cannot conclusively determine the issue of obedience to orders in general international law.

However, I am unable to subscribe without qualification to Professor Dinstein's subsequent observation that '... the fact that we are not satisfied with the strict and inelastic conception underlying Article 8 does not detract in any way from its legal validity in its sphere of application ...'.<sup>56</sup> I shall later in this chapter discuss the question of the existence of any basis in international law for the provision in Article 8.

## THE NUREMBERG JUDGMENT

It is beyond the scope of this thesis, and in any event irrelevant, to analyse the numerous attempts by prosecution and defence counsel at Nuremberg to engraft onto Article 8 nuances which its plain words did not permit. It should be recognised that Article 8 was intended to mean what the words used in it clearly stated: that is, that there was no scope whatever at Nuremberg for a plea of obedience to orders except in relation to mitigation of punishment.

The real problem for examination is the validity of assertions that the justification for including the provision in the form in which it was drafted in Article 8 was established by existing principles of international law, or, as the British chief prosecutor, Sir Hartley Shawcross, argued in his closing speech, that Article 8 was merely declaratory of existing international law:<sup>57</sup>

There is no rule of international law which provides immunity for those who obey orders which ... are manifestly contrary to the very law of nature from which international law has grown.

It was central to the judgment of the Tribunal that 'The law of the Charter is decisive and binding on the Tribunal'.<sup>58</sup> That statement could not, in my opinion, be controverted. The London Agreement and Charter spoke for themselves, for better or for worse. In so far as it was 'for worse', the responsibility lay with the political leaders of the Allied Powers, who, in the months preceding 8 August 1945, met, talked and compromised. The product, in the form of the London Agreement and Charter, cast the law in a mould which could not be changed by ingenuity in argument at the trial.

In the case of the accused Keitel, whose defence raised the doctrine of 'superior orders', the Tribunal, with consistency but without qualification, said that reliance on the doctrine was prohibited by Article 8 of the Charter. But the Tribunal went further, and perhaps gave some relevant meaning to the concluding words of Article 8, although not expressly:<sup>59</sup>

There is nothing in mitigation. Superior orders, even to a soldier, cannot be considered in mitigation where crimes as shocking or extensive have been committed consciously, ruthlessly and without military excuse or justification.

In the case of the accused Jodl, the Tribunal said:<sup>60</sup>

His defence, in brief, is the doctrine of 'superior orders', prohibited by Article 8 of the Charter as a defence. There is nothing in mitigation. Participation in such crimes as these has never been required of any soldier and he [Jodl] cannot now shield himself behind a mythical requirement of soldierly obedience at all costs as his excuse for commission of the crimes. [Jodl was charged and found guilty on all four counts].

The Tribunal did not, however, content itself with reliance merely on provisions of Article 8. In a bald pronouncement it said:

... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside its competence under international law.

It was also submitted on behalf of most of these defendants that in doing what they did they were acting under the orders of Hitler, and therefore cannot be held responsible for the acts committed by them in carrying out these orders. The Charter specifically provides in Article 8:

The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment'.

The provisions of this Article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.

The Tribunal did not cite any authority for these propositions; it did not attempt any historical excursus; it did not mention any of the arguments addressed to it on the question of superior orders; it did not recognise the relevance of the doctrine of mens rea, although, in the cases of those accused at Nuremberg, it would have been difficult to isolate allegations of crimes in which there would have been reasonable opportunity to plead mistake of law or fact or compulsion.

Perhaps the most perplexing aspect of the cited extract from the Judgment is the thinking which prompted the last sentence. The question may be posed: 'true test of what?' Assuming the answer is: 'of guilt or innocence it is intriguing to speculate what the Tribunal meant precisely by the words 'whether moral choice was in fact possible'. Again one asks a question: 'How can a moral choice be made so that as matter of fact it reflects something that is 'possible'? In so far as the last sentence is a brief exegesis by the Tribunal, it fails to justify the provisions in Article 8 from the standpoint of positive international law.<sup>62</sup>

A simple explanation of the meaning of the troublesome sentence, which I am not aware has been previously suggested, at least directly, is that it was an isolated attempt by the Tribunal to engraft on Article 8 an implied principle which it perceived as a correct statement of international law, thereby mitigating the dogmatic rigidity of Article 8 and thus making the Tribunal's firm reliance on it appear more plausible. However, if this was the Tribunal's purpose it seems surprising that it purported to achieve it by adding a sentence which, even in the suggested context, could not have been relevant, while ignoring any mention of other recognised international law principles.

The following opinion of Professor Dinstein is apposite to the foregoing:<sup>63</sup>

It is permissible to voice astonishment that the Nuremberg chief prosecutors themselves found it necessary to resort to an analysis of the Article which divests it of any significance as an authority in general international law. A suspicion hovers in the mind that they were not satisfied with the rigid wording of Article 8 a general stipulation and accordingly interpolated an artificial rider which voids the Article of its content.

In my opinion the criticism in the extract above cited could, with parity of reasoning, be applied to the Tribunal's judgment (supra).

## THE TOKYO TRIBUNAL

Chapter 14 of this thesis contains a general account of the events leading to the establishment of the International Military Tribunal for the Far East ('Tokyo Tribunal') and of matters relevant to the subject of this thesis. In this section of this chapter it is proposed to confine reference to the Tokyo Tribunal to the question of superior orders.

Three months after the indictment was presented to the International Military Tribunal at Berlin, General MacArthur issued a Special Proclamation at Tokyo in his capacity as the Supreme Commander for the Allied Powers in the Far East. Annexed to it was the Charter of the International Military Tribunal for the Far East.

The provisions of Articles 7 and 8 of the London Agreement and Charter were combined in one Article in the case of the Tokyo Tribunal, as follows:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires'. (emphasis added)<sup>64</sup>

It is surprising, as Professor Dinstein noted, that 'Jurists, in general, hold the opinion that the provisions of the

London and Tokyo Charter in regard to obedience to orders are coincident'.<sup>65</sup> In my opinion the words in Article 6 of the Tokyo Charter, emphasised in the foregoing, involve a fundamental divergence from Article 8 of the London Charter, in that they reflect the basic opinion expressed by Mr. Justice Jackson in his Report to the President in June 1945 but cannot be interpreted as consonant with Article 8 of the London Charter.

It is even more surprising that a majority of the eleven judges who constituted the Tokyo Tribunal were oblivious to the basic difference between the two Charters in relation to obedience to superior orders, so much so that they said:<sup>66</sup>

With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached, this Tribunal is in complete accord ... In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions. (emphasis added)

Thus, not only did the majority of the Tokyo Tribunal fail to appreciate the legal significance of the words 'of itself' in Article 6 of the Tokyo Charter, but they endorsed the pronouncements of the Nuremberg Tribunal cited previously in this chapter, including the controversial reference to moral choice.

## THE CASES OF EICHMANN AND CALLEY

The two most noteworthy cases after the 'subsequent proceedings' in Nuremberg were the trials of Adolf Eichmann in Jerusalem in 1961 and of Lieutenant William L. Calley in the United States of America in 1973. Each is instructive in relation to perceptions of the contemporary state, of international law in respect of the defence of superior orders, and will briefly be considered.

### Adolf Eichmann

The indictment in the case of Adolf Eichmann was unique from the viewpoint of the defence of superior orders in that it was framed under a post-World War 2 Israeli statute the Nazis and Nazi Collaborators (Punishment) Law 1950.<sup>67</sup> Provisions of the Israeli Criminal Code Ordinance 1936 recognise the defences of constraint, necessity and obedience to superior orders if the orders are not manifestly unlawful. However, the 1950 special statute excluded the availability of those defences in the case of charges within the terms of that statute.

Eichmann's defence essentially was based on his claim that he was 'nothing more than a "small cog" in the extermination machine'. However, he incriminated himself inextricably by his own evidence, both under pretrial examination and by his testimony before the District Court of Jerusalem.<sup>68</sup>

The Court of first instance rejected the plea of the accused in the light of the relevant statutory provisions and, in any event, held that the orders obeyed by Eichmann were manifestly illegal. His conviction was inevitable in view of his own evidence that 'I must declare that I see in this murder, in the extermination of the Jews, one of the gravest crimes in the history of humanity'.<sup>69</sup>

It is of interest to note that in reaching its judgment the District Court adopted the London Charter (Article 8), and also relied on the Resolution of the General Assembly of the United Nations in respect of the Affirmation of the Nuremberg Principles. It did not otherwise examine the state of positive international law.<sup>70</sup>

The Supreme Court of Israel, on appeal, discussed in some detail the legal issues involved in the plea of superior orders, but dismissed the appeal on the sole basis of the facts of the case.<sup>71</sup>

In view of the special statutory provisions on which the indictment against Eichmann was framed, the sheer enormity and heinousness of the proven charges and the admissions of the accused, the judgments of both courts do not advance the study of the state of international law in respect of the defence of superior orders at the time of Eichmann's trial.

### Lieutenant William L. Calley

The case of Lieutenant William L. Calley is generally regarded as the most important since the Second World War that involved obedience to superior orders.<sup>72</sup> Certainly it is the most well-known case.

Calley was charged before a court-martial with the premeditated murder of 22 infants, children, women and old men, in the village of My Lai (correctly called Son My)<sup>73</sup> on 16 March 1968. Calley was convicted. The Army Court of Military Review affirmed the finding. A petition to the United States Court of Military Appeals (Darden C.J., Duncan J., and Quinn J.) for further review was rejected.

The facts were simple. Calley was the leader of a platoon, part of C Company, which had been operating in the area of Son My for some time. Each time Company C had entered the area it had suffered casualties from sniper fire and indirect forms of attack. Calley claimed that as a result of the casualties, the Company commander issued orders to the effect that the units of C. Company involved in the attack were to kill every living thing—men, women and children and even animal. The Company commander denied the reference to women and children, and stressed that 'you must use common sense'. Calley's platoon entered the village apparently without resistance. The villagers were assembled, including mothers with babies. Calley claimed that he twice received a radio signal from the Company commander asking why the operation was taking so long. Finally, Calley alleged he was told by the Company commander: 'Waste them'. The commander denied this. Calley claimed that having been taught that he must always obey orders, he proceeded to carry out the massacre, with the help of a private soldier.<sup>74</sup>

The Court of Military Appeals focussed its consideration of the petition on the instructions given by the military judge to the members of the court-martial in the following terms:<sup>75</sup>

- (i) if Calley received an order to kill unresisting Vietnamese within his control or within the control of his troops, that order would be an illegal order;
- (ii) however, a determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it;
- (iii) although soldiers are taught to follow orders, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person;
- (iv) the law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders; and
- (v) the acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known by the accused to be unlawful.

These instructions appear clear, concise, logical and consonant with accepted principles of positive international law. It is regrettable that, in Calley's Case, they became the subject of an exercise in semantics, as is shown by the following extract from Professor Johnson's exposition:

Although differing in their opinions slightly, both Quinn J. and Duncan J. were satisfied as to the



correctness of this directive, which was in fact based on paragraph 216(d) of the Manual for Courts Martial, United States, 1969 (Rev.).

Counsel for Calley had argued that the test should be not 'a man of ordinary sense and understanding', but a person of 'the commonest understanding'. The opinion of the leading American commentator on military law, Colonel William Winthrop, was invoked. According to Winthrop's Military Law and Precedents, 2nd edn., 1920 reprint, pp. 296-297, 'for the inferior to assume to determine the question of the lawfulness of an order given, him by a superior would, of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline'. Consequently, according to Winthrop, it was the duty of an inferior to obey an order according to its terms, 'the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness'. However, Quinn J. thought that the order allegedly given to Lieutenant Calley was 'so palpably illegal that whatever conceptional difference there may be between a person of "commonest understanding" and a person of "common understanding", that difference could not have had any impact' on the court.

Darden C.J., on the other hand, considered the correct test to be 'palpable illegality to the commonest understanding'. He believed the provision in the Manual to be too strict, and he was convinced that 'the phrasing of the defence of superior orders should have as its principal objective fairness to the unsophisticated soldier and those of somewhat limited intellect who nonetheless are doing their best to perform their duty'. It is impossible not to sympathise to some extent with this view of Darden C.J., especially when it is borne in mind that the United States forces in Vietnam consisted to a large extent of conscripts and that, because of various devices used by more 'sophisticated' people to avoid the draft, an unusually heavy burden fell upon the 'unsophisticated soldier'. As against that, there is force in the point made by the Army Court of Military Review in Calley's Case that 'barbarism tends to invite reprisal to the detriment of our own force or disrepute which interferes with the achievement of war aims, even though the barbaric acts were preceded by orders for their commission. Casting the defence of obedience to orders solely in subjective terms of mens rea would operate practically to abrogate those objective restraints which are essential to functioning rules of war'. (emphasis added)

The merit of the judgment in Calley's Case will be examined in the author's conclusion to this chapter.

## THE CURIOUS CASE OF THE 'AMERICAN INSTRUCTIONS'

Some months before the judgment of the Nuremberg Military Tribunal was delivered, the United States War Crimes Group, European Theatre, prepared a document, dated 15 July 1946, entitled 'Annotations Prepared by War Crimes Group on Legal Questions Arising in Trials of War Criminals'. The document was later published as part of the 'Manual for Trial of War Crimes and Related Cases', prepared by the Deputy Theater Judge Advocate's Office, War Crimes Group, United States Forces, European Theatre, dated 1 February 1947.<sup>77</sup> In a foreword to the Manual it was stated:

This manual for trial of war crimes cases is prescribed for use by all personnel concerned in such trials. It contains a compilation of the directives covering the important aspects of trials, together with citations of authorities derived from past decisions on questions arising therein, as well as prescribed forms for the records of trials.

Although the Manual was dated 1 February 1947, the relevant observations do not contain any specific reference to the judgment of the Nuremberg Tribunal, which had then been public for four months.

The Manual was not only seriously defective but, since the relevant part lacked incisiveness and positive direction, was calculated to confuse, rather than assist, those for whose use it was prescribed.

The relevant part was introduced by what purports to be an 'extract from the London Agreement on 8 August 1945' in the following terms:

(a) ...

the fact that a defendant acts pursuant to order of a superior or government sanction shall not constitute an absolute defense but may be considered either in defense or in mitigation of punishment if the tribunal before which the charges are being tried determines that justice so requires'. (emphasis added)

There followed the following extract from FM 27-10, WD, US Army, 'Rules of Land Warfare':

Liability of offending individuals (Added) -- Individuals and organisations who violate the accepted laws and customs of war may be punished therefor. However, the fact that the acts complained of were done pursuant to order of a superior or government sanction may be taken into consideration in determining culpability either by way of defense or in mitigation of punishment. The person giving such orders may also be punished. (Par. 345.1, 15 Nov. '44). (emphasis added)

After referring to the Llandovery Case in accurate terms and to the well-known citation from Dr. Goebbels' article in the Berliner Borsenzeitung of 28 May 1944 entitled 'The Air Terror of our Enemies', the Manual cites an extract from an opinion of the Deputy Theater Judge Advocate for War Crimes in the case of United States v. Bury and Hafner, September 1945.

The extract contains the following:

- (a) An accurate reproduction of para. 345.1 of U.S. Army 'Rules of Land Warfare' cited above, but thereby repeating the emphasised words in that citation to which the United States had ceased to subscribe by its signature of the London Agreement and Charter of 8 August 1945.
- (b) A citation in general terms from 'Wharton on Homicide' which did not elucidate the issue in any fundamental way.
- (c) An extract from the Report to the President, of 7 June 1945 by Mr. Justice Jackson (cited above in this chapter), from which he had resiled within two months by endorsing the London Agreement and Charter.
- (d) An extract from an opinion of the Deputy Theater Judge Advocate for War Crimes in the case of United States v. Thomas, December 1945, in which, on the facts and for the purposes of that case, the law was correctly stated.

It is incomprehensible how a document such as has been cited, which was inaccurate and confusing, could have been disseminated to United States legal personnel as a 'prescription', presumably for use in the 'subsequent proceedings' at Nuremberg.

## CONCLUSION

The dimensions of this chapter do not permit of additional detailed analysis of the views of outstanding scholars in the field: for example, Sir Hersch Lauterpacht and Professor L.C. Green. Most of the writings of such scholars recognise the dilemma posed by the conflicting doctrines of respondeat superior and absolute liability. However,

the search for a solution has led scholars along many by-paths, on some of which semantics have been paramount .

The essential question for discussion in this conclusion is whether the law relating to the defence of superior orders is, from the standpoint of international law, now clearly established, and, if so, whether it is based on principles which civilised states can accept as just and appropriate. These questions must be answered with a realisation that the circumstances in which major international warfare may occur in the future will, in all probability, be very different from those which prevailed in the Second World War and resulted in the Nuremberg and Tokyo trials. There will, of course, be exceptions: for example, the Falklands War of 1983 illustrates how, in modern times, warfare can erupt suddenly, although on a limited scale. But we live in the nuclear age, and it is not possible to predict what scope may exist for doctrines related to obedience to superior orders in the event of a nuclear conflagration.

At first sight, Professor Dinstein's thesis based on the principle of *mens rea* appears attractive, but in the opinion of the writer it has some practical disadvantages.

As was pointed out by Professor Johnson: 'the various tests discussed by the judges in the United States Court of Military Appeals in Calley and by the Israeli ... courts in Kafr Kassem, with a view to determining the limits of the defence of superior orders, have a long history behind them'.<sup>78</sup>

The result of the application of the '*mens rea* principle', in strict and direct form, would, as was stated by the appeal court in Calley in the passage cited above, remove any objective test and substitute a completely subjective measure for determining culpability. Such a transition would be inimical to the doctrine of the supremacy of the law in international society.

Further, the concept of *mens rea*, although well known and understood in English law, is much less clear and at times jurisprudentially elusive in other systems, including Russia.<sup>79</sup>

The author is indebted to Professor J.N. Hazard, New York, for the following exposition of contemporary Russian law:<sup>80</sup>

In Soviet law there is a requirement that is set forth in general terms in the current USSR Constitution in Art. 160: 'No one may be adjudged guilty of a crime and subjected to punishment as a criminal except by sentence of a court and in conformity with law'. The Russian Republic's Criminal Code of 1960 has in Art. 7, THE CONCEPT OF CRIME, a definition of crime as a 'socially dangerous act'. Paragraph 2 reads:

An action or omission to act shall not be a crime, although it formally contains the indicia of an act provided for by the Special Part of the present Code, if by reason of its insignificance it does not represent a social danger.

Since abolition of the principle of 'analogy' with adoption of the 1960 Code, the principle has been established that no one can be held responsible for an act not defined in the code, i.e., he must have had notice that the act will be treated as criminal. Before that date, the court had only to find that the act was in the court's definition of the term 'socially dangerous'. At the time of Nuremberg, I think one could say that the accused need not have been warned if the court decided that they had committed a socially dangerous act. The present rule is not as strong as it sounds because some definitions in the Special Part of the Code are vague, and a court has considerable room to conclude that an act is dangerous, but it must relate its finding to the vague definition in some way. Intent is now related to knowledge of the prohibition. Negligent acts may also be criminal under the usual rules of criminal negligence in other systems.

Until there is a universally accepted and practised formulation of the content and bounds of the *mens rea* doctrine--not just the English perception of it--it does not appear to be practicable to attempt to make it, as a distinct legal principle, an integral part of international law.

More than 40 years since Nuremberg, and in the light of the enormous volume of literature which has been written on war crimes since then, as well as against a background of many thousands of cases determined by courts of diverse jurisdictions, my opinion is that international law on superior orders is clear, at least in principle, and in terms which are accepted by an overwhelming percentage of nations. That law is just. It is fair to the serviceman; it respects the supremacy of the law. It is that expressed by the United States Court of Military Appeals in the case of Calley, as cited previously in this chapter. Specifically, I endorse the instructions given by the military judge to the members of the court-martial as already cited. The legal exposition by the judges in the case of Calley would still leave room for the defences of mistake of law or fact or compulsion in appropriate cases.

## NOTES

1. The Charter and Judgment of the Nurnberg Tribunal, Memorandum submitted by the Secretary-General, United Nations General Assembly, New York, 1949, pp. 13-15.
2. Report of Robert H. Jackson to the President, Department of State, United States of America, Publication 2420, European Series 10, United States Government Printing Office, Washington, 1945. The Report was released by the White House on 7 June 1945. The full text of the Report was published in the Department of State Bulletin of 10 June 1945, pp. 1071 et seq.
3. For example, see the critical analysis of the cited extract by Professor Dinstein, The Defence of 'Obedience to Superior Orders' in International Law, A.W. Sijthoff, Leyden, 1965, pp. 110-113. In a strong criticism of the extract cited in the text, Professor Dinstein did not refer to the significance of the words emphasised in the text, as to which he said: 'Unfortunately, this passage is far from being Jackson's consummate piece of writing' (op. cit., p.111). However, in a later passage, Professor Dinstein recognised the change in the United States expression of the validity of the defence of respondeat superior during the interval between Mr. Justice Jackson's Report and the commencement of the Nuremberg Trial (op. cit., pp. 126-127).
4. Dinstein op.cit., p. 126.
5. Nuremberg Trial, I.M.T., Opening Speech for the Prosecution (by Jackson), vol . II, pp . 150-151.
- 5a. For a succinct review of the conflicting doctrines, see Sack, 'Punishment of War Criminals and the Defence of Superior Order', (1944) 60 L.Q.R., pp. 63-68.
6. Dinstein, op. cit., p. 8.
7. Idem
8. Professor D.H.N. Johnson (Challis Professor of International Law, University of Sydney), 'The Protection of the Human Being in Armed Conflicts', address to Seminar on International Humanitarian Law, Canberra, A.C.T., 6-12 February 1983.
9. Dinstein, op. cit., pp. 8-9.
10. Ibid., p. 9.
11. Military Court, Central District 3/57, Military Prosecutor v. Melinki, Pesakim (D), vol. 17, p. 90.
12. Kafr Kassem Case (second instance), op. cit., pp. 410-411.
13. Dinstein, op. cit., p. 11.
14. Case of Robert Neumann, (1922) 16 A.J.I.L., p. 696.
15. Dinstein, op. cit., p. 12.
16. The 'Dover Castle' Case, (1922) 16 A.J.I.L., p. 704.
17. Ibid., p. 707. See the reference to the case in L.R.U.N.W.C.C., vol. 1., p. 31.
18. Dinstein, op. cit., p. 13.

19. Ibid., p. 14, footnote 36.
20. Ibid., pp. 15-18.
21. The Llandovery Castle Case, (1922) 16 A.J.I.L., 708, at p.710.
22. Ibid. pp. 718-722 .
23. See Johnson, loc. cit., pp. 41-44 (paras. 62-64). Professor Johnson stated: ' . . . since it is the municipal system which defines the crime, it is also the municipal system which prescribes the possible excuses for committing the crime, such as infancy, insanity, mistake, compulsion, duress, misadventure, self-defence, necessity and others, including the relevance of superior orders '.
24. Dinstein, op. cit., p. 18.
25. History of U.N.W.C.C., pp. 50-51 and The Times, London, 13 July 1921
26. For a more detailed account of the trial, see Mullins, The Leipzig Trials, H. F. and G . Witherby, London, 1921.
27. Dinstein, op. cit., p. 19.
28. Cf. the instructions given by the military judge to the members of the court-martial of Lieutenant William L. Calley (see Chapter 15), 22 Reports of the United States Court of Military Appeals 534 (1973); 48 Court Martial Reports [United States] 19 (1973). The dichotomy of actual and imputed knowledge formed part of those instructions and was thus expressed: 'The acts of a subordinate done in compliance with an unlawful order given him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful'.
29. Dinstein, op. cit., p. 19, and note 47.
30. Ibid., p. 81.
31. See the bibliographical references by Dinstein, ibid., p. 81, footnote 262.
32. Glueck, op. cit., p. 244, note 49 .
33. Stephen, Digest of the Criminal Law (1877), Art. 202.
34. Scuttled U-Boats Case, L.R. U.N.W.C.C., vol. 1, p. 55.
35. Ibid., p. 70.
- 35a. Ibid., p. 65.
36. The Almelo trial, L.R. U.N.W.C.C., vol. 1, p. 35.
37. Ibid., p. 41.
38. Hans trial L.R. U.N.W.C.C., vol. 5, p. 82. 31 Ibid., p. 82.
39. Ibid., p.92
40. Ibid., p. 93.

41. Trial of Karl Buck and ten others, L.R. U.N.W.C.C., vol. 5, p. 39. 42.
42. Ibid., pp.43-44
43. The Stalag Luft III Case, L.R. U.N.W.C.C., vol. 11, p. 31.
44. The implication in this submission that the accused should have been acquitted if they had reasonable grounds to believe that the prisoners were spies is not correct as a matter of international law, in accordance with which even a spy is entitled to a trial (see the Stalag Luft III Case, ibid., at p. 51).
45. As Dinstein, op. cit., p. 104, in footnote 336 observed, Lauterpacht in 1942 submitted a memorandum to a Committee established by the International Commission for Penal Reconstruction and Development. In 1944 he expanded the memorandum into an article entitled 'The Law of Nations and the Punishment of War Crimes', published in that year in B.Y.I.L. It is that article which is referred to in Dinstein's study by the abbreviation: Lauterpacht, 'War Crimes'.
46. Dinstein, op. cit., p. 86, footnotes 288 and 289. For example, there is a reference to the work by Professor J.G. Starke, 'An Introduction to International Law', 4th edn., p. 370, in which it was stated: 'Probably Courts must take into account the state of mind of the accused; if he believed that the order was lawful, this belief might be a defence, but not if the order was obviously belief might be a defence, but not if the order were obviously illegal. So, just as in ordinary criminal law, the question of mens rea is important'. Professor Starke maintained this text in the 7th edn., published in 1972, several years after Professor; Dinstein's study.
47. Dinstein, op. cit., p. 88.
48. C.R. Report, 29 March 1919, (1920) 14 A.J.I.L., pp. 95-154.
49. General Report of Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, (1938) 32 A.J.I.L., Supp., pp. 1-56 at p. 11.
50. Ibid.
51. Dinstein, op. cit., pp. 102-103.
52. Lauterpacht, 'War Crimes', p. 73 (see note 45).
53. American Draft of Definitive Proposal, International Conference, San Francisco, April 1945, p. 22 at p. 24.
54. Revision of American Draft of Proposed Agreement, International Conference, p. 55 at p. 58.
55. Dinstein, op. cit., p. 117.
56. Ibid.; p. ]18.
57. Nuremberg Trial, I.M.T., Closing Speech for the Prosecution (by Shawcross), vol. XIX, pp. 465-466.
58. I.M.T. Judgment, Cmd. No. 6964, p. 38.
59. Ibid., p. 92.
60. Ibid., p. 118.
61. Ibid., p. 42.

62. There are very many cases and a vast amount of juristic literature in which references have been made to the extract cited from the Tribunal's judgment (see Dinstein, *op. cit.*, p. 148, footnote 482). Dinstein, *ibid.* p. 149, points out that the French text, which is different in a number of respects from the English version, shows that the Tribunal purported to propound a criterion of penal responsibility.
63. Dinstein, *ibid.*, p. 130.
64. Charter of the International Military Tribunal for the Far East, Article 6, approved by the Supreme Commander for the Allied Power on 19 January 1946.
65. Dinstein, *op. cit.*, p. 156. For example, in Oppenheim's International Law, 7th edn., (edited by Lauterpacht), p. 570, note 2, after a reference to Article 8 of the London Charter, it is stated: 'Article 6 of the Charter of the Far Eastern Military Tribunal was to the same effect'.
66. Tokyo Tribunal, Judgment, p. 26.
67. Laws of the State of Israel, vol. 4 (5710-1949/50), p. 154.
68. Eichmann was interrogated for a total of 275 hours between 29 May to February 1961. There was a full record of the interrogations, a transcription of which was made available to him. He made some changes and certified the accuracy and correctness of the record. On one occasion he said: 'All my life I have been accustomed to obedience, from early childhood to May 8, 1945--an obedience which in my years of membership in the SS became blind and unconditional. What would I have gained by disobedience? And whom would it have served? I never at any time played an essential, decisive role in the events from 1935 to 1945; for that, my rank and functions placed me in far too low a position. Nevertheless, I realize of course that I cannot wash my hands in innocence, because the fact that I was an absolute receiver of orders has undoubtedly ceased to mean anything. Though there is no blood on my hands, I shall certainly be convicted of complicity in murder. But, be that as it may, I am inwardly prepared to atone for the terrible events. I know the death penalty awaits me. I am not asking you for mercy, because I am not entitled to it'. Source: Eichmann Interrogated, transcripts from the Archives of the Israeli Police, edited by Jochen von Lang, first published in Great Britain 1983.
69. Eichmann trial (first instance), Minutes, Session No. 95, p. VI. Dinstein points out (*op. cit.*, pp. 207-208, footnote 760) that the Hebrew rendering of the words 'I see' in the cited extract was 'I saw'. The difference is hardly significant in the circumstances.
70. Dinstein, *op. cit.*, p. 207.
71. *Ibid.*, p. 213.
72. Johnson, *loc. cit.*, pp. 14-18 (paras. 22-30).
73. General Telford Taylor, Nuremberg and Vietnam: An American Tragedy 1970, *op. cit.*, *passim*.
74. This brief account of the facts is based on Johnson, *loc. cit.*, pp. 16 - 17
75. *Ibid.*, pp. 16-17 (para. 27).
76. *Ibid.*, pp. 17-18 (paras 28-30).
77. The copy in the author's possession was obtained from the United Nations Organisation, Archives Section, New York, on 10 January 1983.
78. See Johnson, *loc. cit.*, pp. 31-32 (para. 48); Hare, Constitutional Law, (1889), p. 920; Keighley v. Bell, 4 F and F (1886) 763 at p. 790, 176 E.R. 781 at p. 793 per Willes J; and the case of Wirz, which arose out of atrocities committed against Federal prisoners of war during the American Civil War and is cited by



Johnson, loc. cit., p. 31.

79. For a discussion of Soviet attitudes to intent, including the history of Soviet: approaches to the concept and the current situation, see Feldbrugge, Soviet Criminal Law: General Part (Law in Eastern Europe, No. 9), Leyden: A.W. Sijthoff, 1964, Library of Congress Catalogue Card Number 64-22594.
80. Personal letter from Professor Hazard to the writer dated 4 May 1983. Professor Hazard was a member of the American delegation to the London Conference which preceded the London Agreement and Charter of 8 August 1945.

## CHAPTER 13 PROCEEDINGS AT NUREMBERG SUBSEQUENT TO THE PRINCIPAL TRIAL: 1946-1949

### THE ESTABLISHMENT OF JURISDICTION

It was inevitable that the principal Allied Powers should perceive that the complicated machinery and procedure prescribed, of necessity, for the International Military Tribunal were not appropriate for the trial of the large number of war criminals who could fairly be classified as 'major' and who fell into the hands of the Allies in the months following the unconditional surrender of Germany on 8 May 1945. During the same period vast masses of documents, of an extraordinarily incriminating character, came into the possession of the Allies. They were to provide a cogent evidentiary basis for subsequent proceedings.

In his Report to the President of the United States on 7 June 1945, Mr. Justice Jackson said:<sup>1</sup>

Whom will we accuse and put to their defense? We will accuse a large number of individuals and officials who were in authority in the government, in the military establishment, including the General Staff, and in the financial, industrial and economic life of Germany, who by all civilized standards are provable to be common criminals ... Our case against the major defendants is concerned with the Nazi master plan, not with individual barbarities and perversions which occurred independently of any central plan.

Thus the rationale for the trials at Nuremberg, which are commonly referred to as the 'Subsequent Proceedings', was proclaimed. In contrast to the trial of major war criminals before the International Military Tribunal, the trials encompassed within the 'Subsequent Proceedings' were conducted under the direct authority of the Allied Control Council as an integral part of the administration of the American Zone of Occupation, one of the four zones established by the Allied Powers.<sup>2</sup>

On 20 December 1945, the four Occupation Powers, by an instrument signed at Berlin by the four Zone Commanders, promulgated Control Council Law No. 10 entitled 'Punishment of Persons guilty of War Crimes, Crimes against Peace and against Humanity'. The preamble of the Law was:

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows: (emphasis added)

Because a clear appreciation of the terms of Law No. 10 is essential to an understanding of its jurisdictional status, it is presented in Annexe I to this chapter.

Supplementary to Law No. 10 was Military Government Ordinance No. 7, issued on 18 October 1946. It also is basic to the question of the jurisdiction of the Tribunals established under Law No. 10, and, for that reason, is reproduced in Annexe 2.

Some writers have regarded Law No. 10 (supplemented by Ordinance No. 7) as virtually identical with the London Agreement and Charter,<sup>3</sup> but it will be argued in this chapter that such a view is too simplistic and, in fact, incorrect.

It must be borne in mind that the genesis of the 'Subsequent Proceedings' was a Law put into force by the Powers which were in joint occupation of Germany, just as the Charter of the International Military Tribunal was the expression of the legislative authority of the same occupying Powers, although the Charter was not described by the word 'Law'. Both instruments were executed in accordance with established principles of international law, in the circumstances which existed; that is, a former belligerent having surrendered

unconditionally to the Allied Powers, which were at all relevant times in actual occupation of the defeated country, in which there was no national Government. That statement of the legal Authority of the occupying Powers is developed in Chapter 18.

But despite this identity of origin, it is necessary to examine the detailed provisions of the London Charter and of Law No.10 (of which Ordinance No.7 was an integral part) in order to identify the differences of substance between the two instruments.

First, Article 1 of Law No.10 expressly provided that 'the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945' (of which the Charter annexed to the Agreement was, by virtue of Article 2 of the Agreement, declared to 'form an integral part' thereof) 'are made integral parts of this Law'. Arguably, this provision was perceived by those who framed the Law as enhancing the authority of the Moscow Declaration and the London Agreement, and, in part, as being calculated to assist the prosecution in rebutting a defence based on the ex post facto principle.

Second, Article II, paragraph 1(a), in its specification of 'Crimes against Peace' as crimes was more expansive than the corresponding provision in The London Charter in two respects: (a) 'Initiation of invasions of other countries' was recognised as a crime against peace, thereby expressly including the invasion of Austria on 12 March 1938 and the ultimate seizure of the major part of Czechoslovakia on 15 March 1939 as bases for a Count in the indictment charging crimes against peace; (b) the concept of a 'war of aggression' was differently conceived. In the London Charter, the definition of 'crimes against peace' related to 'a war of aggression' or 'a war in violation of international treaties, agreements or assurances'. In Law No. 10, the words 'laws and' were inserted before the word 'treaties' (first occurring). In the writer's opinion, the inclusion of those words furnished a jurisdictional basis for charging war criminals with initiating wars of aggression in violation not only of international treaties but also 'international laws', an expression which is understood by the writer to embrace the whole body of positive international penal law.

Thus, in the 'Ministries Case', paragraph 1 of Count 1 of the indictment was phrased precisely in accordance with Article II, paragraph 1(a) of Law No.10. Paragraph 24 of Count 1, under the heading 'Violation of Law' was in these terms:

24. The acts and conduct set forth in this Count were committed by the defendants unlawfully, wilfully and knowingly, and constitute violations of international law, treaties, agreements and assurances, and of Article II of Control Council Law No.10. (emphasis added).

In its judgment in the 'Ministries Case', the Tribunal said (pp. 336-337 of volume 14 of the series referred to later in this chapter as 'N.M.T.'):

We hold that the invasions and wars described in paragraph 2 of the indictment [Count I] ... were unlawful and aggressive, violated international law, and were crimes within the definition of the London Charter and Control Council Law No. 10. (emphasis added)

Several of those accused in the 'Ministries Case' under Count 1 were found guilty.

Third, in Article 6(b) of the London Charter the expression 'war crimes' was defined in general terms as 'violations of the laws or customs of war', followed by some examples, which expressly were declared not to be exhaustive; in Law No. 10, the definition (also followed by the same examples, which were not exhaustive) was more expansively expressed thus: 'Atrocities or offenses against persons or property constituting violations of the laws or customs of war'. The generic definition of 'war crimes' was therefore wider in Law No. 10. It is not suggested that the difference in expression involved any practical distinction in the scope of the respective provisions; however, it seems curious that the draftsmen of Law No. 10 saw fit to alter the words in the London Charter. It is also difficult to appreciate why the words 'of or in' preceding the words 'occupied territory' in the London Charter were changed to 'from' in Law No. 10. It is arguable that the change could have had significance. In the writer's opinion the word 'from' in the context is more restrictive than 'of or in'.

Fourth, there are clearly differences in scope in the definitions of 'Crimes against Humanity' in Article

6(c) of the London Charter and in paragraph 1(c) of Article II of Law No. 10; in particular, the omission of the words 'in execution of or in connection with any crime within the jurisdiction of the Tribunal' appearing in the London Charter potentially enlarged the definition of 'Crimes against Humanity' for the purposes of the 'Subsequent Proceedings'.

Fifth, Article II (2) of Law No. 10 conferred an extremely wider jurisdiction on the Tribunals than that for which the London Charter made provision by the addendum to Article 6 of the Charter relating to 'leaders, organisers, instigators and accomplices'. In particular, Article II (2)(f) of Law No. 10, which was concerned with Crimes against Peace, was drafted in terms which created responsibility in respect of vast numbers of political, civil and military personnel.

Sixth, Article II (5) of Law No. 10 was novel. It deprived an accused person of 'the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945'.

The organisation and powers of the Tribunals before which the 'Subsequent Proceedings' were conducted were prescribed by Ordinance No. 7, pursuant to which the Tribunals were established.

It has already been noted that the London Agreement and Charter were made integral parts of Law No. 10. No provision was, however, included in that law for the reconciliation of variations between the two enabling instruments. I am not aware that this question arose at Nuremberg in the 'Subsequent Proceedings'. If it had done so, it would have been the duty of the Tribunal to apply normal principles of statutory construction; that is, the four instruments--the London Agreement, the London Charter, Law No. 10 and Ordinance No. 7--would have required interpretation as one whole document, however incongruous that may have appeared. However, it does not seem that in practice any difficulty arose in this respect.

From the viewpoint of evidence and procedure, Article X of Ordinance No. 7 was of singular significance. It provided:-

The determinations of the International Military Tribunal in the judgment in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

That provision, on the vast scale contemplated by its terms as being applicable to determinations and statements as to the proof of facts of the International Military Tribunal, is not only unique in the context but is also whimsical in the extreme. It sharply distinguished the legal setting for the 'Subsequent Proceedings' from that of the International Military Tribunal, the trial before which was itself, in the words of the President, 'unique in the history of the jurisprudence of the world' (see Chapter 10, Annex 2).

A further matter of distinction is that Ordinance No. 7 authorised opening statements by the defence--a normal practice but one which was not available before the International Tribunal.

Brigadier General Taylor has stated (see note 2):

In general, Law No. 10 adopted the London agreement as a model, although the language differed in numerous important particulars. Each of the four Zone Commanders was authorised to arrest suspected war criminals and to establish 'appropriate tribunals for their trial. Elaborate provisions were included for the exchange of war crimes suspects among the four occupation zones and for their delivery to other countries.

The delivery of Judgment was completed by the International Military Tribunal on 1 October 1946. Control Council Law No. 10 was dated 20 December 1945. Ordinance No. 7 became effective on 18 October 1946. In the writer's view, a conscious effort was made to enhance the clarity of expression in Law No. 10 compared with the London Charter. The result was the production of an instrument, supplemented by Ordinance No. 7, which was more concise, incisive and felicitously expressed than the London Charter.

The judgment of the International Tribunal was declared res judicata in all material respects. In the 'Einsatzgruppen Case' (N.M.T., vol. 4, at p. 457) the Tribunal said:

The legal consequences drawn from the International Military Tribunal adjudication, which is now res judicata, may not be altered by the assertion that someone else may also have been at fault [a reference to the argument of defence counsel that Control Council Law No. 10 was inapplicable because of the fact that Russia, a signatory to the Law, had signed a secret treaty with Germany on 23 August 1939, agreeing to a division of Poland].

The true nature of the Tribunals for the 'Subsequent Proceedings' was expressed in the judgment in the 'Flick Case' in these terms:

As to the Tribunal, its nature and competence: The Tribunal is not a court of the United States as that term is used in the Constitution of the United States. It is not a court martial. It is not a military commission. It is an international tribunal established by the International Control Council, the high legislative branch of the four Allied Powers now controlling Germany . . . The judges were legally appointed by the Military Governor and the later act of the President of the United States in respect to this was nothing more than a confirmation of the appointments by the Military Governor. The Tribunal administers international law. It is not bound by the general statutes of the United States or even by those parts of its Constitution which relate to courts of the United States.

The same Tribunal expounded the following principles as expressing what it termed 'the spirit of the law of civilised nations':

1. There can be no conviction without proof of personal guilt.
2. Such guilt must be proved beyond a reasonable doubt.
3. The presumption of innocence follows each defendant throughout the trial.
4. The burden of proof is at all times upon the prosecution.
5. If from credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must be taken.

The authority of the Nuremberg Tribunals for the 'Subsequent Proceedings' was succinctly expressed in the judgment of the United States Court of Appeals for the District of Columbia Circuit in the course of appeal proceedings in the United States by the accused Flick. It stated (N.M.T., vol. 6, 1227, at p. 1231):

We think it [the Tribunal in the 'Flick Case'] was, in all essential respects, an international court. Its power and jurisdiction arose out of the joint sovereignty of the four victorious Powers. The exercise of their supreme authority became vested in the Control Council. .. Concededly, the International Military Tribunal, established under the London Agreement, was a court of international character. How, then, can it be said that Military Tribunal IV was not of the same character, with its existence and jurisdiction rooted in the sovereignty of the Four Powers, exercised jointly through the supreme governing authority of the Control Council. We think, therefore, that the tribunals established under its authority were legitimate and appropriate instruments of judicial power for the trial of war criminals (see (1945) 39 A.J.I.L., p 525).

The Court accordingly held that the Tribunal which tried and sentenced Flick was not a tribunal of the United States and that a United States court was therefore without power to review the judgment and sentence.

There can be no doubt that sovereign legislative authority was vested in the four Occupation Powers in the

circumstances which existed when Control Council Law No. 10 and Ordinance No. 7 were promulgated. The real point at issue, however, is whether or not those instruments gave expression to international law as it existed when the acts alleged in the indictment were committed. That issue is discussed in Chapter 18.

## THE TRIALS IN THE 'SUBSEQUENT PROCEEDINGS'

The wide scope and enormous documentation involved in the trials which comprised the 'Subsequent Proceedings' are described by Brigadier General Taylor in the monograph referred to in note 2. In his words: 'At peak strength (July - November 1947), the Nuremberg trials required the services of nearly nine hundred American and allied employees and about an equal number of Germans. Some idea of the magnitude of the undertaking may be gathered from the fact that in one twelve-month period (1 September 1947 - 1 September 1948) the language division [of the Office, Chief of Counsel] translated and stencilled 133,262 pages of material, or about 520 pages per day'.

The description and classification of the 'Subsequent Proceedings' are conveniently set forth in a summary arrangement of the cases in the fifteen-volume series 'Trials of War Criminals before the Nuernberg Military Tribunals', United States Government Printing Office, Washington, 1952. It is reproduced as Annexe 3 to this Chapter.

In relation to the Allied Powers other than the United States of America, Brigadier General Taylor has said (see note 2):

In the Soviet zone of occupation, so far as is known to the writer, little or nothing was ever done to carry Law No. 10 into effect. The British, in their zone, preferred to handle war crimes on a military basis under the 'Royal Warrant'. In the French zone, at Rastatt (near Baden-Baden), one major trial under law No. 10 and several of lesser interest have been held.

From the necessarily brief summary in this chapter of the twelve trials by tribunals established under Control Council Law No. 10 in the American Zone of Occupation, conclusions will be drawn as to the extent to which they served to consolidate the judgment of the International Military Tribunal at Nuremberg and affirm it as a recognised source of substantive international penal law.

### The 'Medical Case' (Case No. 1)

Twenty three accused were tried in the 'Medical Case'. They mainly were high-ranking officers in the German Medical Service; all except three were physicians. The exceptions were administrative personnel involved in medical affairs.

The indictment contained four Counts:

Count 1. The Common Design or Conspiracy.

Counts 2 and 3. War Crimes and Crimes against Humanity.

Count 4. (referable to ten of the accused). Membership in an organisation declared to be criminal by the International Military Tribunal.

The nature of the charges was that 'all of the accused were principals in, accessories to, ordered, abetted, took a consenting part in and were connected with plans and enterprises involving medical experiments without the subjects' consent ... in the course of which experiments the defendants committed murders, brutalities, cruelties, tortures, atrocities and other inhuman acts'. In addition to the medical experiments, some of the defendants were charged with criminal acts, involving murder, torture, and ill treatment of non-German nationals. Sixteen of the accused were found guilty.

The case is important for two reasons.

First, the Tribunal, in the course of the trial, made the following ruling:<sup>4</sup>

Count I of the indictment in this case charges that the defendants, acting pursuant to a common design, unlawfully, wilfully, and knowingly did conspire and agree together to commit war crimes and crimes against humanity as defined in Control Council Law No. 10, Article 2. It is charged that the alleged crime was committed between September 1939 and April 1945.

It is the ruling of this Tribunal that neither the Charter of the International Military Tribunal nor Control Council Law No. 10 has defined conspiracy to commit a war crime or crime against humanity as a separate substantive crime; therefore, this Tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense.

Count I of the indictment, in addition to the separate charge of conspiracy, also alleges unlawful participation in the formulation and execution of plans to commit war crimes and crimes against humanity which actually involved the commission of such crimes. We, therefore, cannot properly strike the whole of Count I from the indictment, but insofar as Count I charges the commission of the alleged crime of conspiracy as a separate substantive offense, distinct from any war crime or crime against humanity, the Tribunal will disregard that charge.

This ruling must not be construed as limiting the force or effect of Article 2, paragraph 2 of Control Council Law No. 10, or as denying to either prosecution or defense the right to offer in evidence any facts or circumstances, occurring either before or after September 1939, if such facts or circumstances tend to prove or to disprove the commission by any defendant of war crimes or crimes against humanity as defined in Control Council Law No. 10.

The second paragraph of this citation is, in my opinion, the correct juridicial exposition of the problem arising from the manner in which Count the principal Nuremberg indictment was framed. The International Military Tribunal's judgment in this respect has been discussed in Chapter 8.<sup>5</sup>

Second, the case is a striking illustration of the consequences of the inclusion in the principal Nuremberg Charter, and subsequently in the indictment pursuant to it, of the provisions relating to the 'indicted' organisations.

Of the ten accused in the 'Medical Case' of membership in an organisation declared criminal by the judgment of the International Military Tribunal, nine were found guilty under other Counts. However, in the case of Helmut Poppendick the accused was found guilty only under Count 4, the other charges against him having been abandoned by the prosecution and 'not considered further' by the Tribunal.<sup>6</sup> In imposing sentence, the Tribunal said:<sup>7</sup>

... For your said crimes ... Military Tribunal I sentences you to imprisonment for a term of ten years  
....

The Tribunal had previously stated:<sup>8</sup>

In weighing the punishment, if any, which should be meted out to the defendant for his guilt by reason of the charge contained in Count four of the indictment, this Tribunal will give such consideration to the recommendations of the International Military Tribunal as may under the premises seem meet and proper.

In the circumstances, especially the abandonment by the prosecution of the only charges of substance against

Poppendick, the question arises whether he was justly treated, even although Control Council Law No. 10 expressly provided that 'membership in categories of a criminal group or organisation declared criminal by the International Military Tribunal is ... recognised as a crime'. The question may the more easily be answered by a consideration of his background, as set out in a footnote.<sup>9</sup>

Poppendick petitioned the Military Governor of the United States Zone of Occupation for review of the sentence. The petition was a particularly moving and compelling document, which emphasised that the accused's only 'crime' was his membership of the SS and that the sentence, which was the first of its kind imposed in the American Zone against an SS member, had established a precedent for all military tribunals.<sup>10</sup>

The petition was denied. In his circumstances, Poppendick did not have any other avenue of appeal. His case can only be regarded as illustrative of what, at times, was the harsh character of the administration of justice at Nuremberg, more particularly because it was the first case in the 'Subsequent Proceedings'. \*

(\* The writer has recently noted a novel work on the Medical Case, entitled 'The First German War Crimes Trial', by Judge Walter B. Beals, the presiding judge in the case. It comprises mainly a reproduction of Judge Beals' 'desk notebook', which he maintained throughout the trial. It is a novel source of previously unpublished material: New Edition, 1985, Documentary Publications, Chapel Hill, North Carolina, U.S.A.).

The 'Milch Case' (Case No. 2)

Erhard Milch was the only accused in the 'Milch Case' (Case No. 2, Military Tribunal II, N.M.T. vol. 2).<sup>11</sup> Milch had been a Field Marshal in the German Air Force. He was indicted on three Counts, which in summary were:

Count 1. War crimes involving murder, slave labor, deportation of civilian population for slave labor, cruel and inhuman treatment of foreign labourers, and the use of prisoners of war in war operations by force and compulsion .

Count 2. War crimes, involving murder, subjecting involuntary victims to low-pressure and freezing experiments resulting in torture and death.

Count 3. Crimes against humanity, involving murder and the same unlawful acts specified in Counts 1 and 2 against German nationals and nationals of other countries.

The Tribunal in its judgment dealt first with Count 2. It held that the guilt of the accused in respect of the medical experiments had not been established beyond reasonable doubt and acquitted him. He was convicted on Counts 1 and 3. The Tribunal cited lengthy parts of the judgment of the International Military Tribunal in its findings against the accused Alhert Speer<sup>12</sup> and said:<sup>13</sup>

Under the provisions of Article X of Ordinance No. 7, these determinations of fact by the International Military Tribunal are binding upon this Tribunal 'in the absence of substantial new evidence to the contrary'. Any new evidence which was presented was in no way contradictory of the findings of the International Military Tribunal, but, on the contrary, ratified and affirmed them.

The Tribunal further stated:<sup>14</sup>

Count three of the indictment charges the defendant with crimes against humanity committed against 'German nationals and nationals of other countries'. Sufficient proof was not adduced as to such offenses against German nationals to justify an adjudication of guilt on that ground. As to such crimes against nationals of other countries, the evidence shows that a large number of Hungarian Jews and other nationals of Hungary and Romania, which countries were occupied by Germany, but were not belligerents, were subjected to the same tortures and deportations as were the nationals of Poland and Russia. In Count one of the indictment these acts are charged as war crimes and have heretofore been considered by the Tribunal under that Count in this judgment. In the judgment of the International



Military Tribunal ..., the court stated: 'From the beginning of the war in 1939, war crimes were committed on a vast scale which were also crimes against humanity'. This is a finding of law and an interpretation of Control Council Law No. 10, with which this Tribunal is in full accord.

Our conclusion is that the same unlawful acts of violence which constituted war crimes under Count one of the indictment also constitute crimes against humanity as alleged in Count three of the indictment. Having determined the defendant to be guilty of war crimes under Count 1, it follows, of necessity, that he is also guilty of the separate offense of crimes against humanity, as alleged in Count three, and this tribunal so determines.

The 'Milch Case' is not of substantial significance in the context of this thesis. Nevertheless it raises two legal matters which merit brief mention.

First, the Tribunal acquitted the accused of one of the three Counts. It found him guilty of the first Count--war crimes--and also guilty on Count 3--crimes against humanity--on the basis of the same facts. For authority, the Tribunal relied on the cited statement of the International Military Tribunal and its own interpretation of Control Council Law No. 10. Such a duality of findings of guilt was only made legally tenable by virtue of the express terms of the London Charter and Control Council Law No. 10. The duality is not, in general, recognised as part of Anglo-American criminal jurisprudence.

Second, the 'Milch Case' was the first in the 'Subsequent Proceedings' to close. Its judgment could therefore be regarded as a precedent. Albert Speer, considerably superior in influence in the German hierarchy to Milch, was indicted under all four Counts before the International Military Tribunal. He was found not guilty on Counts 1 and 2, but guilty under Counts 3 and 4 (war crimes and crimes against humanity) and sentenced to imprisonment for twenty years. Milch was sentenced to imprisonment for the remainder of his natural life. The basis of the disparity in the sentences is questionable.

### The Altstoetter Case' (Case No. 3)

The third trial in the 'Subsequent Proceedings', officially designated United States v. Josef Altstoetter et al., is commonly known as the 'Justice Case', because, in the words of the prosecution, the defendants were 'the embodiment of what passed for justice in the Third Reich'.<sup>15</sup>

All the accused were connected with the German judicial system as judges, prosecutors or ministerial officers.<sup>16</sup> In the events which happened sixteen were indicted and fourteen were tried.<sup>17</sup> Four of the accused were found not guilty, and ten were held guilty of war crimes, crimes against humanity, or membership of criminal organisations, or of two or all three of such charges.

The following extract from the headnote of a report of, and commentary on, the case in the series selected and prepared by the United Nations War Crimes Commission, illustrates the breadth of the legal issues which were considered:<sup>18</sup>

In its judgment, the Tribunal dealt, inter alia, with the legal basis of the Tribunal and of the law which it applied, the scope of the concept of crimes against humanity, the legal position of countries occupied by Germany during the war, the illegality of condemning to death nationals of such territories for high treason against Germany, the illegality of proceedings taken under the Nacht und Nebel plan, and in general the legal aspects of the part taken in furthering the persecution of Jews and Poles and other aspects of Nazi policy by various of the accused acting in their official or judicial capacities.

Two aspects of the judgment have been chosen by the author for some elaboration:- first, the course of the development of International law and second the concept of conspiracy (cf. Count 1 of the principal Nuremberg

indictment).

In respect of international law, Military Tribunal III stated in its judgment:<sup>19</sup>

The defendants claim protection under the principle nullum crimen sine lege, though they withheld from others the benefit of that rule during the Hitler regime. Obviously the principle in question constitutes no limitation upon the power or right of the Tribunal to punish acts which can properly be held to have been violations of international law when committed. By way of illustration, we observe that C.C. Law 10, article II, paragraph 1(b), 'War Crimes', has by reference incorporated the rules by which war crimes are to be identified. In all such cases it remains only for the Tribunal, after the manner of the common law, to determine the content of those rules under the impact of changing conditions.

Whatever view may be held as to the nature and source of our authority under C.C. Law 10 and under common international law, the ex post facto rule, properly understood, constitutes no legal nor moral barrier to prosecution in this case.

Under written constitutions the ex post facto rule condemns statutes which define as criminal, acts committed before the law was passed, but the ex post facto rule cannot apply in the international field as it does under constitutional mandate in the domestic field. Even in the domestic field the prohibition of the rule does not apply to the decisions of common law courts, though the question at issue be novel. International law is not the product of statute for the simple reason that there is as yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the ex post facto rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the event. To have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle that law at birth.

[However,] as a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught. Whether it be considered codification or substantive legislation, no person who knowingly committed the acts made punishable by C.C. Law 10 can assert that he did not know that he would be brought to account for his acts.

Second, the case is noteworthy for the fact that in circumstances that are described below, the Tribunal delivered a significant judgment on the issue of conspiracy, which was the essence of the first Count in the indictment. Although the extracts to be cited are lengthy, the arguments of counsel must be fully understood as a basis for the ultimate consideration of the Tribunal's judgment.

The Trial in the 'Justice Case' began on 5 March 1947. On 9 July 1947, a joint session of five United States Military Tribunals was held in order to hear counsel argue regarding the sufficiency of Counts which charged defendants with conspiracy to commit war crimes and crimes against humanity as a separate offence.<sup>20</sup> Such Counts had been brought not only against the accused in the 'Justice Case' but also against the defendants -in the trial of Karl Brandt and others, the 'Medical Case', and in the trial of Oswald Pohl and others, which were also being held before certain of the Military Tribunals ... Counsel for the defendants in these three trials challenged the sufficiency of the Counts, while General Taylor, who led the prosecution in these trials, upheld it. (The essence of the principal arguments of counsel is contained in Annexe 4 to this chapter).<sup>21</sup>

The Tribunals decided in favour of the defence submission, and the Tribunal conducting the 'Justice Case' ruled accordingly, on the grounds that the Tribunals were bound by the provisions of Law No.10 and of the Charter of the Military Tribunal, which did not define conspiracy to commit a war crime or a crime against humanity as a

separate substantive crime. The Tribunal made an order identical with that of the Tribunal in the Medical Case as cited above, and its final Judgment included the following:

This Tribunal has held that it has no jurisdiction to try any defendant for the crime of conspiracy as a separate substantive offence but we recognise that there are allegations in Count One of the Indictment which constitute charges of direct commission of war crimes and crimes against humanity. However, after eliminating the conspiracy charge from Count One, we find that all other alleged criminal acts therein set forth and committed after 1st September, 1939, are also charged as crimes in the subsequent counts of the indictment. We therefore find it unnecessary to pass formally upon the remaining charges in Count One. Our pronouncements of guilt or innocence under Counts Two, Three, and Four dispose of all issues which have been submitted to us.

#### The 'Pohl Case' (Case No. 4)

One of the three cases<sup>22</sup> in the 'Subsequent Proceedings' which involved ethnological issues (that is, Nazi racial policy) was the trial of Oswald Pohl et al., (the 'Pohl Case'). The principal defendant was Oswald Pohl, a Lieutenant-General in the Waffen SS, who was Chief of the Economic and Administrative Department (commonly known as the 'WVHA', derived from the German language description of the Department). He was indicted with seventeen other officials of the Department. There were four Counts: the common design or conspiracy; war crimes; crimes against humanity; and (except in the case of one defendant) membership in a criminal organisation. These crimes included murders, brutalities, cruelties, tortures, atrocities, deportations, enslavement, forced labor, plunder of property, and other inhumane and unlawful acts'.<sup>23</sup>

The judgment in the Pohl Case is not remarkable for pronouncements on legal issues. No doubt this was due, at least in part, to the fact that the Tribunal applied a similar ruling on the conspiracy count (Count 1) to that made in the 'Justice Case'; further, the crimes charged involved essentially questions of fact with a mass of the most revolting evidence imaginable.

However, one aspect of the case relating to procedural fairness is noteworthy. It is convenient to reproduce the following extract from the 'supplemental' judgment of the Tribunal.<sup>24</sup>

On 3 November 1947 the judgment was read in open Court and sentence imposed upon those defendants found guilty. Subsequently, counsel for the convicted defendants filed petitions with the Military Governor of the United States Zone of Occupation asking revision of the sentences under Article XVII(a) of Ordinance No. 7. In these petitions various reasons were given for revision of the judgment, including claims that the proof had not been properly evaluated by the Tribunal, that various exhibits had been misinterpreted, that findings of fact were not supported by the evidence, and that there was injustice in the disparity of sentences. Two defendants stated that in preparing the judgment, the Tribunal had denied the defendants the right to answer prosecution's briefs filed against them. The Military Governor did not pass on the contentions of any of the defendants, but instead, at the request of the Tribunal, issued General Order No. 52, dated 7 June 1948, ordering it to reconvene on or about 12 July 1948, 'for the purpose of permitting such reconsideration and revision of its judgment as may be appropriate'. The Tribunal accordingly reconvened, and on 14 July 1948 entered an order reading in part as follows:

In conformity with the policy of the Tribunal to afford defense counsel every possible opportunity to present full and complete arguments in behalf of the defense, such counsel as wish to do so will now be permitted to prepare and submit briefs in reply to the prosecution's briefs. If, after fully considering such defense briefs, it should appear to the Tribunal that the judgment heretofore entered to any defendant is not then supported by the evidence and that his guilt has not then been proved beyond a reasonable doubt, or that the sentence imposed is unjust, the Tribunal will thereupon vacate, modify, or amend the judgment now entered in accordance with the facts and the law as so determined.

It will be observed that this order gave opportunity to all defendants to submit any arguments they wished, based on the record in the case. This completely removed any possibility of prejudice arising from the manner in which defendants claimed the original judgment had been prepared. It gave the defendants an unrestricted opportunity to supplement the 909 pages of defence argument already submitted with further briefs of any scope desired. In addition, the Tribunal ordered the return of all defendants to Nuernberg from the Landsberg prison so that their counsel could have free opportunity to consult with them.

It is the firm opinion of the Tribunal that this fulfilled every requirement of full and complete justice to the defendants, and gave them all the protection in their legal rights which could be asked.

Reconsideration of the evidence after judgment and new findings of fact based thereon are not new concepts in Anglo-Saxon Law. Motions for new trial, motions for rehearing, motions to reduce the verdict of a jury to conform to the proofs, and motions for judgment non obstante veredicto are familiar procedural steps in all courts. That is exactly what is being done in this case. No new or additional proof is being offered or received. The entire evidence heretofore received is being reexamined, and reanalyzed de novo, with the aid of additional defense arguments now submitted in briefs. The fact that a judicial conclusion was reached in the original judgment does not preclude the Tribunal from reaching a different judicial conclusion, if, after further deliberation, with or without briefs, such conclusion appears just and appropriate. Judicial judgments are not immutable. If the original court or an appellate court in the interest of justice sees fit to modify them, the power and authority to do so, even on its own motion, is undoubted, with the possible limitation that no penalty fixed by the original judgment could be increased. Defense counsel have taken the strange position of objecting to a supplemental proceeding which could not be prejudicial and could be beneficial to their clients.

The 'supplemental' judgment comprised 85 pages. The cases of all accused were reviewed and detailed reasons were given either confirming the original judgment and sentence or, as occurred in four cases, reducing the severity of the sentence imposed (in one case reducing a sentence of death to life imprisonment). The Military Governor of the U.S. Zone of Occupation subsequently commuted a sentence of death imposed on one of the accused to imprisonment for life.

#### The 'Flick Case' (Case No. 5)

The case of United States v. Friedrich Flick et. al., was one of three cases wholly concerned with the alleged criminal responsibility of prominent German industrialists. The six accused were leading officials in what was termed the 'Flick Concern' or its subsidiary companies. They were charged with the commission of war crimes and crimes against humanity, principally because of their conduct as officials of the 'Flick Concern'. There were five Counts in the indictment, which may be summarily described thus:

Count 1: Participation in the forcible deportation of many thousands of foreign nationals, concentration camp inmates and prisoners of war to forced labor in industrial enterprises;

Count 2: The seizure of plants and properties in France and the Soviet Union;

Count 3 (which the Tribunal rejected): Crimes against humanity, by participating in the persecution of Jews during the pre-war years (1936-39) by acquiring Jewish industrial and mining properties under the German Government's 'Aryanisation' policy; (emphasis added)

Count 4: Participation knowingly in persecutions and other atrocities committed by the SS by means of substantial financial subventions and association with the so-called 'Himmler Circle';

Count 5 (one of the lesser defendants only): Membership in a criminal organisation.

Flick was found guilty under Counts 1, 2 and 4; two other accused were adjudged guilty on two Counts and one Count respectively. The other three defendants were completely acquitted.

It is only relevant to this thesis to refer briefly to three legal issues which were determined by the Tribunal.

First, the Tribunal extended the conclusion of the International Military Tribunal that international law recognises the criminal responsibility of individuals as distinct from the actions of sovereign States. After referring to the judgment of the I.M.T. at pp. 41-42, including a citation from the judgment of the U.S. Supreme Court in Ex Parte Quirin (1942) 317 U. S. 1, the Tribunal stated: <sup>25</sup>

But IMT was dealing with officials and agencies of the State, and it is urged that individuals holding no public offices and not representing the State, do not, and should not come within the class of persons criminally responsible for a breach of international law. It is asserted that international law is a matter wholly outside the work, interest, and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in propria persona. The application of international law to individuals is no novelty. (See The Nuernberg Trial and Aggressive War by Sheldon Glueck, ch. V, pp. 60-67, incl., and cases there cited.) There is no justification for a limitation of responsibility to public officials.

Second, in contrast with the positions of those indicted before the International Military Tribunal, it was held that the facts of the Flick Case allowed scope for the recognition of the defence of necessity in respect of some of those charged. The Tribunal said: <sup>26</sup>

The evidence with respect to defendants [four were named] in our opinion ... clearly established that there was in the instant case 'clear and present danger' within the contemplation of that phrase. We have already discussed the Reich reign of terror. The defendants lived within the Reich. The Reich, through its hordes of enforcement officials and secret police, was always 'present', ready to go into instant action and to mete out savage and immediate punishment against anyone doing anything that could be construed as obstructing or hindering the carrying out of governmental regulations or decrees.

However, in the cases of Flick and one of his associates, their 'active steps' deprived them of the 'complete defence of necessity'. <sup>27</sup> The use of the word 'complete' in this context was clearly a reference to the mitigating circumstances, which were recognised by the Tribunal and reflected in the light punishment imposed, even in the case of Flick.

Third, Count 3 was an extremely weak charge. It purposed to inculcate Flick and two associates with 'crimes against humanity' by virtue of their having been involved in four transactions by which the Flick interests acquired industrial property formerly owned or controlled by Jews, by taking advantage of the German 'Aryanisation' program. The Tribunal emphasised that the London Agreement and Charter were concerned with 'war criminals' and that the International Military Tribunal had declined to exercise jurisdiction in respect of crimes against humanity occurring before 1 September 1939. In any event, the Tribunal held that the evidence tendered under Count 3 did not constitute 'crimes against humanity'. It stated: <sup>28</sup>

Jurists and legal writers have been and are presently groping for an adequate inclusive definition of crimes against humanity. Donnedieu de Vabres [member for the French Republic of the International Military Tribunal] recently said: 'The theory of "crimes against humanity" is dangerous: dangerous for the States because it offers a pretext to intervention by a State in the internal affairs of weaker States'. (a) (Our emphasis).

(a) The Judgment of Nuremberg and the Principle of Legality of Offenses and Penalties, Donnedieu de Vabres, published in Review of Penal Law and of Criminology in Brussels, July 1947, translated by

J. Herisson, page 22.

### The 'I.G. Farben Case' (Case No. 6)

The most involved and, from the viewpoint of evidence, the most voluminous of the industrialist cases, was the indictment of twenty directors and four senior officers of the I.G. Farbenindustrie A.G., popularly known as the 'Farben Case' (United States v. Carl Krauch et al., Case No. 6). The case of one accused was severed from the indictment at an early stage of the trial because of his ill health and consequent inability to stand trial.

All of the defendants were charged with planning and waging aggressive war (Count 1), spoliation (Count 2), enslavement and mistreatment of prisoners of war, deportees and concentration camp inmates (Count 3), and participation in a common plan or conspiracy to commit crimes against peace, including war crimes and crimes against humanity (Count 5). Three of the accused also were charged with membership of the SS, declared by the I.M.T. to be criminal.

The indictment, with appendices, comprised 70 pages; the English transcript of the Court proceedings covered nearly 16,000 mimeographed pages, excluding separate concurring and dissenting judicial opinions; there were more than 6,000 written exhibits. Important though the trial was, it was limited relevance to this thesis. Consequently, only some isolated issues will be discussed briefly and references to dissenting judgments will be excluded.

The Farben company was a vast chemicals and synthetics combine which developed processes and factories for the manufacture of synthetic gasoline and rubber, each of which was essential for mechanised and aerial warfare.

All the defendants were acquitted under Counts 1 and 5, which were predicated on the same facts, involved the same evidence and were considered by the Tribunal together. The defence of 'necessity' was held valid to a liberal degree. Only in respect of Count 2 was the Tribunal unanimous, and some charges under that Count were dismissed.

The Tribunal referred to the judgment of the I.M.T. in these terms: <sup>29</sup>

That well-considered judgment is basic and persuasive as to all matters determined therein. In the I.M.T. case, Count two bears a marked similarity to Count one in this case. Count one of that case is similar to our Count five.

One of the most important rulings in the Tribunal's judgment in the 'Farben Case' was in these terms: <sup>30</sup>

There remains the question as to whether the evidence establishes that any of the defendants are guilty of 'waging a war of aggression' within the meaning of Article II, 1, (a) of Control Council Law No. 10. This calls for an interpretation of the quoted clause. Is it an offense under international law for a citizen of a state that has launched an aggressive attack on another country to support and aid such war efforts of his government, or is liability to be limited to those who are responsible for the formulation and execution of the policies that result in the carrying on of such a war.

It is to be noted in this connection that the express purpose of Control Council Law No. 10, as declared in its preamble, was to 'give effect to the terms of the Moscow Declaration of 30 October 1943, and the London Agreement of 8 August 1945, and the charter issued pursuant thereto'. The Moscow Declaration gave warning that the 'German officers and men and members of the Nazi Party' who were responsible for 'atrocities, massacres and cold-blooded mass executions' would be prosecuted for such offenses. Nothing was said in that declaration about criminal liability for waging a war of aggression. The London Agreement is entitled an agreement 'for the Prosecution and Punishment of the Major War Criminals of the European Axis'. There is nothing in that agreement or in the attached Charter to

indicate that the words 'waging a war of aggression' were intended to apply to any and all persons who aided, supported, or contributed to the carrying on of an aggressive war; and it may be added that the persons indicted and tried before the IMT may fairly be classified as 'major war criminals' insofar as their activities were concerned. Consistent with the express purpose of the London Agreement to reach the 'major war criminals,' the judgment of the IMT declared that 'mass punishments should be avoided'.

To depart from the concept that only major war criminals—that is, those persons in the political, military, and industrial fields, for example, who were responsible for the formulation and execution of policies—may be held liable for waging wars of aggression, would lead far afield. Under such circumstances there could be no practical limitation on criminal responsibility that would not include, on principle, the private soldier on the battlefield, the farmer who increased his production of foodstuffs to sustain the armed forces, or the housewife who conserved fats for the making of munitions. Under such a construction the entire manpower of Germany could, at the uncontrolled discretion of the indicting authorities, be held to answer for waging wars of aggression. That would, indeed, result in the possibility of mass punishments.

The defendants now before us were neither high public officials in the civil government nor high military officers. Their participation was that of followers and not leaders. If we lower the standard of participation to include them, it is difficult to find a logical place to draw the line between the guilty and the innocent among the great mass of German people.

To find the defendants guilty of waging aggressive war would require us to move the mark without finding a firm place in which to reset it. We leave the mark where we find it, well satisfied that individuals who plan and lead a nation into and in an aggressive war should be held guilty of crimes against peace, but not those who merely follow the leaders and whose participations, like those of Speer, 'were in aid of the war effort in the same way that other productive enterprises aid in the waging of war.' (IMT judgment, p.122).

On the issue of conspiracy, the Farben Tribunal expanded the elaboration of its juridical application, as expressed in the I.M.T. judgment, when it stated:

In order to be participants in a common plan or conspiracy, it is elementary that the accused must know of the plan or conspiracy. In this connection we quote from a case cited by both the prosecution and defense, Direct Sales Company vs. United States, 319 U.S. 703, 63 S. Ct. 1265. In discussing United States vs. Falcone, 311 U.S. 205, 61 S. Ct. 204, 85 L. ed. 128, the Supreme Court of the United States said:

That decision comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from knowledge the buyer will use the goods illegally.

Further along in the opinion it is said with regard to the intent of a seller to promote and cooperate in the intended illegal use of goods by a buyer:

This intent, when given effect by overt act, is the gist of conspiracy. While it is not identical with mere knowledge that another purposes unlawful action, it is not unrelated to such knowledge. Without the knowledge, the intent cannot exist. (United States vs. Falcone, supra.) Furthermore, to establish the intent, the evidence of knowledge must be clear, not equivocal. (Ibid.) This, because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning what, in that case, was called a dragnet to draw in all substantive crimes.

Count five charges that the acts and conduct of the defendants set forth in count one and all of the allegations made in count one are incorporated in count five. Since we have already reached the

conclusion that none of the defendants participated in the planning or knowingly participated in the preparation and initiation or waging of a war or wars of aggression or invasions of other countries, it follows that they are not guilty of the charge of being parties to a common plan or conspiracy to do these same things.

We find that none of the defendants is guilty of the crimes set forth in counts one and five. They are, therefore, acquitted under said counts.

### The 'Hostage Case' (Case No. 7)

The description of the 'Hostage Case' is commonly used to refer to the case of United States v. List et al., in which twelve prominent army officers were indicted for war crimes committed during the German occupation of Yugoslavia, Albania and Greece. The principal accused was Field Marshal Wilhelm List.

The following summary of the indictment is derived from the source recorded in the notes.<sup>31</sup>

The indictment consisted of four counts. Count one was concerned with crimes against humanity and war crimes encompassing the murder of thousands of persons from the civilian population of Greece, Yugoslavia, and Albania in connection with hostage and reprisal actions. Seven defendants were found guilty of this count and three were acquitted; two of the latter were acquitted of all counts of the indictment. In addition, defendant Weichs' trial was suspended because of illness, and defendant Boehme committed suicide.

Count two of the indictment dealt predominantly with the plundering, looting, or wanton destruction of private and public property in Norway, Greece, Yugoslavia, and Albania. Defendant Felmy was found guilty of this count.

Count three of the indictment consisted of participation in the initiation, distribution, or execution of illegal orders, including directives that enemy troops may be denied quarter or status and rights of prisoners of war. Five defendants were found guilty of this count.

Count four related to the illegal treatment of civilian populations by murder, torture, persecution, imprisonment in concentration camps, deportation as slave labor, and similar acts. Three defendants were found guilty of this count.

In view of his intimate knowledge of the case as U.S. Chief of Counsel for War Crimes, Brigadier General Taylor's assessment of the judgment by Military Tribunal V is important and is reproduced at length:<sup>32</sup>

The judgment was noteworthy alike for its excellent workmanship and its conservatism. Two of the most hotly debated issues in the case were whether 'partisans' or 'guerrillas' are entitled to the rights of belligerents and to be treated as prisoners of war when captured, and whether it is ever lawful for an occupying power to execute hostages taken from the civilian populations. As to the first question, the Tribunal declared -

Just as the spy may act lawfully for his country and at the same time be a war criminal to the enemy, so guerrillas may render great service to their country and, in the event of success, become heroes well, still they remain war criminals in the eyes of the enemy and may be treated as such. In no other way can an army guard and protect itself from the gadly tactics of such armed resistance. And, on the other hand, members of such resistance forces must accept the increased risks involved in this mode of fighting. Such forces are technically not lawful belligerents and are not entitled to protection as prisoners of war when captured. ...

We think the rule is established that a civilian who aids, abets or participates in the fighting is liable to



punishment as a war criminal under the laws of war. Fighting is legitimate only for the combatant personnel of a country. It is only this group that is entitled to treatment as prisoners of war and incurs no liability beyond detention after capture or surrender.<sup>33</sup>

and determined, on the record before it, that -

There is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of international law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents.<sup>34</sup>

Turning to the question of 'hostages' taken from the civilian population, and subsequently executed in reprisal for acts of violence against the occupying army, the court wrote:

The idea that an innocent person may be killed for the criminal act of another is abhorrent to every natural law. We condemn the injustice of any such rule as a barbarous relic of ancient times. But it is not our province to write international law as we would have it,--we must apply it as we find it.

An examination of the available evidence on the subject convinces us that hostages may be taken in order to guarantee the peaceful conduct of the populations of occupied territories and, when certain conditions exist and the necessary preliminaries have been taken, they may, as a last resort, be shot. The taking of hostages is based fundamentally on a theory of collective responsibility. ... The occupant may properly insist upon compliance with regulations necessary to the security of the occupying forces and for the maintenance of law and order. In the accomplishment of this objective, the occupant may only as a last resort, take and execute hostages.<sup>35</sup>

However, this right was hedged about with numerous qualifications:

... there must be some connection between the population from whom the hostages are taken and the crime committed. If the act was committed by isolated persons or bands from distant localities without the knowledge or approval of the population or public authorities, and which, therefore, neither the authorities nor the population could have prevented, the basis for the taking of hostages, or the shooting of hostages already taken, does not exist.

It is essential to a lawful taking of hostages under customary law that proclamation be made, giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason the hostages will be shot. The number of hostages shot must not exceed in severity the offenses the shooting is designed to deter. Unless the foregoing requirements are met, the shooting of hostages is in contravention of international law and is a war crime in itself.<sup>36</sup>

And these restrictions the Germans had consistently overlooked:

The evidence in this case recites a record of killing and destruction seldom exceeded in modern history. Thousands of innocent inhabitants lost their lives by means of a firing squad or hangman's noose,--people who had the same inherent desire to live as do these defendants. ... Mass shootings of the innocent population, deportations for slave labor and the indiscriminate destruction of public and private property, not only in Yugoslavia and Greece but in many other countries as well, lend credit to the assertion that terrorism and intimidation was the accepted solution to any and all opposition to the German will. It is clear, also, that this had become a general practice and a major weapon of warfare by the German Wehrmacht. ...

That the acts charged as crimes in the indictment occurred is amply established by the evidence. In fact is evident that they constitute only a portion of the large number of such acts which took place as a part of a general plan for subduing the countries of Yugoslavia and Greece. The guilt of the German occupation forces is not only proven beyond a reasonable doubt but it casts a pall of shame upon a once

highly respected nation and its people. The defendants themselves recognize this situation when they decry the policies of Hitler and assert that they continually protested against orders of superiors issued in conformity with the plan of terrorism and intimidation.<sup>37</sup>

The plea of 'superior orders', although not a defense, was considered with other circumstances in mitigation in the fixing of punishment. No death sentences were imposed, but the Tribunal observed:

... mitigation of punishment does not in any sense of the word reduce the degree of the crime. It is more a matter of grace than of defense. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings of the court with reference to the degree of magnitude of the crime.<sup>38</sup>

Field Marshal List and Lieutenant General Kuntze were convicted and sentenced to life imprisonment. Five other lieutenant generals drew terms of seven to twenty years. General Rendulic also was sentenced to twenty years, but was acquitted of the charges relating to the devastation of northern Norway, the court finding that under 'the conditions, as they appeared to the defendant at the time ... he could honestly conclude that urgent military necessity warranted the decision made'.<sup>39</sup> The two defendants who had served as chiefs of staff (rather than as commanders), Lieutenant General Foertsch and Brigadier General Geitner, were acquitted of all charges. Although both had known of the criminal orders which led to the atrocities, and indeed had initialled and distributed some of them, the Tribunal concluded that their lack of 'command of authority', and the 'want of direct evidence placing responsibility' upon them, required their acquittal.<sup>40</sup>

In a magnanimous tribute to the Tribunal, Brigadier General Taylor concluded:<sup>41</sup>

The 'Hostage Case' judgment has been much criticized in the countries formerly occupied by Germany, as well as in the Soviet-controlled German press. The sentences were attacked as unduly lenient, but much more bitter were the comments on the Tribunal's legal rulings upholding the right of an occupying power, under certain circumstances, to shoot hostages and to deny 'partisans' the status of belligerents. Particularly to former members of 'underground' or 'resistance' movements these decisions were anathema. In Norway, the partial acquittal of Rendulic aroused a furore.

One can easily understand these protests, but, in the writer's view, they have tended to obscure the admirable workmanship of the judgment. Furthermore, these were much-mooted questions, with highly political overtones, and it is hard to criticize the court's conservative determination to apply international law 'as we find it', not 'as we would have it'. In the long run, this may well promote the revision of international law along more enlightened lines, which is far more important than the decision with respect to these particular defendants.

### The 'RUSHA Case' (Case No. 8)

Brigadier General Taylor said of the trial of the indictment in United States v. Ulrich Greifelt et al., Case No. 8, usually known as the 'RuSHA Case', that '... the factual subject-matter of the case is perhaps more interesting than the legal issues or the judgment, which presents few, if any, remarkable features'.<sup>42</sup>

The title 'RuSHA' is derived from an abbreviation of the German language words for 'Main Race and Resettlement Office'. The trial was the second 'SS case', in which fourteen officials of 'RuSHA' and three other offices or agencies of the SS 'were charged with criminal conduct allegedly arising out of their functions as officials of the four agencies mentioned. It was alleged that the crimes charged to the defendants were connected with a systematic program of genocide. In its judgment the Tribunal ... declared that these SS organisations existed for one primary purpose in effecting the ideology and program of Hitler, which may be summed up in one phrase (sic)--The twofold objective of weakening and eventually destroying other nations while at the same time strengthening Germany, territorially and biologically, at the expense of

conquered nations'.<sup>43</sup>

The Tribunal, in a 79-page judgment,<sup>44</sup> concentrated almost completely on the fact of the case. There was only one brief and not significant reference to the I.M.T. Judgment. However, it is noted that at p. 599 vol. 4 of the I.M.T. series the following footnote appears:

Since World War II genocide has become the widely used term to describe the systematic persecution and elimination of ethnic or religious groups. After the completion of this trial, the General Assembly of the United Nations, by resolution of 9 December 1948, adopted a convention entitled 'Convention on the Prevention and Punishment of the Crime of Genocide'.

#### The 'Einsatzgruppen Case' (Case No. 9)

In the words of Brigadier General Taylor:<sup>45</sup>

By far the most interesting of the three SS cases was United States v. Otto Ohlendorf et al., (Case No. 9), commonly known as the 'Einsatzgruppen' Case. The Einsatzgruppen were special units of the SS that accompanied the German army during the invasion and occupation of the Soviet Union, with the general mission of ensuring 'political security' in the occupied areas. As conceived and executed by the SS, this mission involved the immediate and outright slaughter of all Jews in the occupied areas, as well as of certain other specified categories, including Communist party functionaries and Gypsies. It was established that approximately one million Jews and others were 'liquidated' in Russia by the Einsatzgruppen. The twentyfour defendants were commanders or subordinate officers of these units, and their trial was, not unnaturally, widely publicized as the 'biggest murder trial in history'.<sup>46</sup>

The facts were stark, simple but horrifying and the Tribunal declared:<sup>47</sup>

[The facts] are so beyond the experience of normal man and the range of man-made phenomena that only the most complete judicial inquiry, and the most exhaustive trial, could verify and confirm them. Although the principal accusation is murder and, unhappily, man has been killing man ever since the days of Cain, the charge of purposeful homicide in this case reaches such fantastic proportions and surpasses such credible limits that believability must be bolstered with assurance a hundred times repeated.

The defendants were not gangsters and thugs as the Tribunal stated:<sup>48</sup>

The defendants are not untutored aborigines incapable of appreciation of the finer values of life and living. Each man at the best has had the benefit of considerable schooling. Eight are lawyers, one a university professor, another a dental physician, still another an expert on art. One, as an opera singer, gave concerts throughout Germany before he began his tour of Russia with the Einsatzkommandos. This group of educated and well-bred men does not even lack a former minister, self-unfrocked though he was.

Again, this case need not be pursued in the context of this chapter. The legal issues raised were not novel. It is merely noted that the Tribunal in this case held, as it was bound to do, that 'the legal consequences drawn from the International Military Tribunal Adjudication, which is now res judicata, may not be altered by the assertion that someone else may also have been at fault'.<sup>49</sup>

### The 'Krupp Case' (Case No. 10)

The third trial of industrialists was pursuant to the indictment United States v. Alfried Krupp von Bohlen und Halbach. The accused was the son of Dr Gustav von Bohlen und Halbach, who was charged under the principal Nuremberg indictment, but did not undergo trial because of his mental and physical condition. The majority of the prosecution had failed in its efforts to substitute his son as an accused (see Chapter 10).

The Krupp industrial empire was vast and powerful. Alfried Krupp and eleven other officials of the firm were indicted on charges of crimes against peace (Count 1), plunder and spoliation (Count 2), deportation, exploitation and abuse of slave labor (Count 3) and participation in a common plan and conspiracy to commit crimes against peace (Count 4), the latter Count being based upon the allegations of fact set forth in Counts 1, 2 and 3.

In the course of the trial, the Tribunal upheld a defence submission in respect of Counts 1 and 4. It stated:<sup>50</sup>

We have come to the conclusion that the competent and relevant evidence in the case fails to show beyond a reasonable doubt that any of the defendants is guilty of the offenses charged in counts one and four ... the defendants are acquitted and adjudged not guilty [on those counts].

The judgment in respect of Counts 2 and 3 was infelicitously arranged and presented. Of ten who were charged under Count 2, six were convicted and four were acquitted. Under Count 3, by which all the defendants were charged, only one was acquitted.

There was a considerable degree of lack of unanimity among the three judges, involving both substantive charges and sentences. Ultimately, the sentence imposed on Krupp—twelve years imprisonment and forfeiture of all his property—was the subject of a technical variation relating to his property.

The only legal issue of real significance which was determined by the Tribunal was the defense of necessity, particularly in relation to Count 3. <sup>51</sup> However, the facts which the Tribunal found established were overwhelmingly strong and the conclusion of guilt appears from the report of the case in the N.M.T. series to have been inevitable.

### The 'Ministries Case' (Case No. 11)

It was predictable that, against the political background of all of the Nuremberg trials, the indictment in United States v. Ernst Weizsaecker et. al., referred to as the 'Ministries' or 'Wilhelmstrasse' Case, should have been 'the largest, longest and last' of the 'Subsequent Proceedings' at Nuremberg.<sup>52</sup>

There were twenty one defendants, of whom eighteen were ministers or high officials in the civil administration of the Third Reich. The other accused were two SS generals and a banker.

The material submitted under the eight-Count indictment was massive. The transcript of the Court proceedings occupied nearly 29,000 pages. There were about 8,000 written exhibits. In total, there were 339 witnesses. The judgment was 883 pages in length. It is neither practicable nor necessary in the context of this chapter to consider the indictment, evidence or judgment even in bare outline. However, attention will be drawn to some of the legal issues in the light of the I.M.T. judgment. It is convenient to do so by brief references to the Counts *seriatim*, but introductory observations by the Tribunal should first be noted:<sup>53</sup>

International law is not statutory. It is in part defined by and described in treaties and covenants among the powers of the world. Nevertheless, much of it consists of practices, principles and standards which have become developed over the years and have found general acceptance among the civilized powers of the world. It has grown and expanded as the concepts of international right and wrong have

grown. It has never been suggested that it has been codified, or that its boundaries have been specifically defined, or that specific sanctions have been prescribed for violations of it. The various Hague and Geneva Conventions, the Constitution and the Charter of the League of Nations, and the Kellogg-Briand treaties have given definitive shape to limited fields of international law. It can be said that insofar as certain acts are prohibited or permitted by these treaties or covenants, a codification exists and specific rules of conduct prescribed. It does not follow however that they are exclusive, and assuredly it cannot be said that they cover or pretend to cover the entire field of international law.

In determining whether the action of a nation is in accordance with or violates international law, resort may be had not only to those treaties and covenants, but to treatises on the subject and to the principles which lie beneath and back of these treaties, covenants, and learned treatises; and we need not hesitate, after having determined what they are, to apply them to new or different situations. It is by this very means that all legal codes, civil or criminal, have developed.

In consonance with the I.M.T., the Tribunal in the Ministries Case relied on the existence of the 1928 Pact of Paris and the writings of authors, such as Professor Quincy Wright, in support of the proposition that Germany, by being a signatory of the Pact, had renounced war as an 'instrumentality of government policy'.<sup>54</sup>

Count 1: crimes against peace. The Tribunal concurred in and applied the principles stated by the I.M.T. in its judgment. Defences based on alleged coercion or duress were rejected.

Count 2: common plan or conspiracy. On the motion of the prosecution, three accused were dismissed from this Count. In respect of those remaining charged under this Count, the Tribunal merely said:<sup>55</sup>

The Tribunal is of the opinion that no evidence has been offered to substantiate a conviction of the defendants in a common plan and conspiracy, and all the defendants charged therein are hereby acquitted.

No reasons were stated for that conclusion.

Count 3: war crimes, murder, and ill-treatment of belligerents and prisoners of war. The Tribunal did not discuss any general legal propositions. Some of those accused were acquitted; others were convicted.

Count: 4: crimes against humanity involving German nationals before the outbreak of war. After argument, the Tribunal dismissed this Count for reasons similar to those given by the I.M.T. in an analogous context.

Count 5: war crimes and crimes against humanity; atrocities and offences committed against civilian populations. Again, the Tribunal did not deal with any legal issues. Its findings of guilty against some of those charged under this Count were based on its judgment as to the facts.

Count 6: war crimes and crimes against humanity, plunder and spoliation. Almost entirely, the Tribunal's decisions under this Count were based on its view of the facts and there was little discussion of legal principles.

Count 7: war crimes and crimes against humanity; slave labor. The Tribunal confined itself to examination and analysis of the evidence.

Count 8: membership in criminal organisations. Of the fourteen accused under this Count, twelve were convicted and two acquitted.

Despite the massive judgment delivered by the Tribunal in the Ministries Case, it did not—and probably could not in the circumstances have been expected to—illuminate any fundamental legal propositions relevant in the context of this chapter. The Tribunal adhered strictly to the principles stated in the judgment of the I.M.T.

It is appropriate to reproduce the eulogy of Brigadier General Taylor.<sup>56</sup>

Considering the gravity of the offenses for which the defendants were convicted, the sentences are perhaps somewhat lenient ... but no doubt the Tribunal was governed in its decision by its evaluation of the evidence of actual criminality under the definitions laid down in Control Council Law No. 10 rather than by the depth of the Party hue. Certainly the judgment as a whole was a distinguished and monumental piece of work, workmanlike and penetrating throughout.

### The 'High Command Case' (Case No. 12)

The trial of the Wehrmacht High Command (trial of United States v. Wilhelm von Leeb et al., Case No. 12) involved the indictment, among others, of Field Marshal von Leeb, the most senior German field marshal of World War II, five generals and five lieutenant generals, including the Judge Advocate General of the Wehrmacht, one of whom committed suicide on the opening day of the trial. Thirteen stood trial.

The accused were charged with having committed, together with other leaders of the Third Reich, crimes against peace, war crimes and crimes against humanity, and with having participated in a common plan or conspiracy to commit crimes against peace.

Many of the accused had attended major conferences at which Hitler communicated his invasion plans; others were privy to the plans and took part in drafting them.

The Tribunal before which the 'High Command Case' was tried, adopted and purported to apply the principles laid down by the International Military Tribunal with regard to 'the law of the Charter'.<sup>57</sup> However, in a section of its judgment (less than seven pages),<sup>58</sup> all defendants were found not guilty under Count 1. In its judgment the Tribunal said:

The crime denounced by the law is the use of war as an instrument of national policy. Those who commit the crime are those who participate at the policy making level in planning, preparing, or in initiating war. After war is initiated and is being waged, the policy question then involved becomes one of extending, continuing or discontinuing the war. The crime at this stage likewise must be committed at the policy making level.

The making of a national policy is essentially political, though it may require, and of necessity does require, if war is to be one element of that policy, a consideration of matters military as well as matters political.

It is self-evident that national policies are made by man. When men make a policy that is criminal under international law they are criminally responsible for so doing. That is the logical and inescapable conclusion.

The acts of commanders and staff officers below the policy level, in planning campaigns, preparing means for carrying them out, moving against a country on orders and fighting a war after it has been instituted do not constitute the planning, preparation, initiation and waging of war or the initiation of invasion that international law denounces as criminal.

Accordingly, without any discussion or finding by the Tribunal in relation to the practical functions or the activities of any of the individual defendants, they were all acquitted of crimes against peace. Before the International Military Tribunal at Nuremberg, Keitel, Raeder, Jodl and von Neurath, all of whom were, in general, in positions analogous to those occupied by most of the high-ranking officers indicted in the 'High Command Case', and all of whom were found guilty of crimes against peace and two of whom were sentenced to death, did not receive the benefit of the determination by the Tribunal in the 'High Command Case' that 'they were not on the policy level'.<sup>59</sup>

Early in its judgment the Tribunal dealt with the conspiracy Count (Count 4). It said: <sup>60</sup>

It is difficult to see, as the facts have developed in this case, how a conspiracy charge can be of the slightest aid to the prosecution. If the defendants committed the acts charged in this conspiracy Count, they are guilty of crimes charged under Counts one, two and three, and are punishable as principals.

The conspiracy Count has not resulted in the introduction of any evidence that is not admissible under the other Counts, nor does it, as the evidence has developed in this case, impose any criminality not attached to a violation under such preceding Counts .

The Tribunal struck out Count 4 because on the facts 'no separate substantive offense is shown'. However the Tribunal added:-

... we .. express no opinion as to whether in all cases and under all factual developments the charge of conspiracy should be disregarded. Such determination should depend upon the proof adduced in each case.

In the 'High Command Case', two accused were acquitted on all Counts; von Leeb was convicted on Count 3; all other defendants were found guilty under Counts 2 and 3.

The 'High Command Case' was the last of the 'Subsequent Proceedings' to open and the second last to close. Thus the American curtain was drawn at Nuremberg with two fundamental questions still subject to a degree of juridical dubiety: first, the concept of crimes against peace; second, the whole gamut of the web of criminal conspiracy. The curtain was not to be raised again at any high judicial level before an American court until nearly 25 years later when the United States Supreme Court considered the case of Lieutenant William L. Calley (see Chapters 12 and 15).

## THE LEGAL SIGNIFICANCE OF THE 'SUBSEQUENT PROCEEDINGS'

Although Brigadier General Taylor has stated that 'except with respect to the status and rights of 'partisans' and 'guerrillas', the Nuremberg trials do not shed much new light on the laws of war relating to combat',<sup>61</sup> some fundamental legal issues arose in the proceedings which merit mention by way of summary in the context.

Hostages and Partisans. The focus of the 'Hostage Case' has been discussed previously in this chapter and the views of Brigadier General Taylor have been set forth at length. In expressing those views he did not cavil with the Tribunal's judgment, extremely sensitive though the issue was. The literature considered by the author does not appear to contain authoritative and unbiased criticism of the judgment. History may well render its verdict by approbation of the summation by Brigadier General Taylor cited above.<sup>62</sup>

The defence of necessity. The 'Flick Case', as much as any other of the Nuremberg trials, recognised established principles of international law relating to the availability of the defence of necessity in appropriate circumstances. Professor Dinstein has pointed out<sup>63</sup> that '[the] balancing process had already been stressed in the 1868 St. Petersburg Declaration where the laws of war were depicted as "limits within which the necessities of war ought to yield to the demands of humanity"'.<sup>64</sup>

Crimes against peace. As has been shown previously in this chapter, the divergence between the approach of the International Military Tribunal and that of the Tribunal in the 'High Command Case' to the concept of crimes against peace befalls the elucidation of the principles which, if the occasion arose again, would be adjudged appropriate to condemn an alleged war criminal on a charge of having committed a crime against peace.<sup>65</sup>

Conspiracy. The manner in which the International Military Tribunal applied the facts as found to the

charge of participation in a common plan or conspiracy for the accomplishment of 'crimes against peace', as defined in Article 6(a) of the London Charter, was tempered to a degree by the judgment of the Tribunal in the 'High Command Case'. More important, however, as discussed in Chapter 8, is the legal notion of convicting an accused on both a charge of conspiracy to commit 'crimes against peace' and, at the same time, of actually committing such crimes. This notion was generally rejected in the 'Subsequent Proceedings'.

## CONCLUSION

Professor Hans-Heinrich Jescheck, a distinguished German academic and author, has evaluated the 13 Nuremberg Trials in these terms: <sup>66</sup>

If a situation similar to that following World War II arises and war crimes trials are conducted again, authority would undoubtedly be sought primarily in the Nuremberg Judgments. The Nuremberg Courts decided of necessity many questions of law which are still debated; for that reason, their judgments roused ample criticism from all sides. It would, nevertheless, be unjust and beside the point to dismiss them as an expression of political bias or revenge. It is a milestone in the development of international law that such grave crimes as were committed in World War II were punished in 13 court judgments following trials in which the accused enjoyed the full right to a defence. Even though many crimes committed on the Allied side remained unatoned for and in some cases unjust sentences were pronounced as a result of human short-comings, the example of Nuremberg is a landmark in the law when viewed as a whole. One only regrets that it has not been followed. [Was this a reference to the case of Lieutenant Calley?] The trials are slowly fading from memory and are thus losing their imperative force as precedents.<sup>67</sup>

I concur generally with the views of Professor Jescheck expressed in the cited passage, with the exception of the first sentence. The reference therein to the 'Nuremberg Judgments' fails to recognise that the judgments were reached in accordance with the terms of the London Charter and Control Council Law No. 10, each of which was binding on the relevant Tribunal. To the extent to which any of the Tribunals expounded legal propositions which were merely expressive of, or supportive of, the terms of those instruments, they were obiter and did not have imperative force as precedents (emphasis added), as stated by Professor Jescheck, supra.



## NOTES

1. Jackson, loc. cit., pp . 4-5.
2. The writer has derived much of the primary source material used in the compilation of this chapter from the monograph by Brigadier General Taylor, who was appointed Chief of Counsel for War Crimes in succession to Mr. Justice Jackson on 24 October 1946. The monograph was published by the Carnegie Endowment for International Peace: International Conciliation, Nuremberg Trials, War Crimes and International Law, New York, April 1949, No. 450. In order to avoid an excessive number of footnotes, specific reference to the monograph has not been made in some cases.
3. Sec Dinstein, op. cit., p. 163 and notes 542 and 543.
4. The 'Medical Case' (Case No. 1, Military Tribunal I) N.M.T. ., vols . 1-2, pp. 1-352 at p. 122; transcript, pp. 10717-10718, 14 July 1947. The reference is to the series 'Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, in fifteen volumes, Nuernberg, October 1946 - April 1949.
5. I.M.T. Judgment, pp 42—44.
6. 'Medical Case' (Case No.1) loc.cit., p.248
7. Ibid., p.299
8. Ibid. , p. 248-249
9. Ibid., pp.248-249  
 Poppendick studied medicine at several German universities from 1921 to 1926 and passed his state examination in December of the latter year. He joined the NSDAt on 1 March 1932 and the SS on 1 July following. He rose to the rank of lieutenant colonel in the SS and to the rank of senior colonel in the Waffen SS. He was also a member of a Nazi Physicians Association . In August 1935 he was appointed as a physician in the Main Race and Settlement Office in Berlin and became chief physician of that Office in 1941. He held the latter appointment until the fall of 1944.  
 From 1 September 1939 until some time in 1941, Poppendick was on active duty in the army as a surgeon. During the latter year he resumed his duties with the Race and Settlement Office in Berlin. Between 1939 and 1943, he performed some duties as a member of the staff of the Reich Physician SS and Police, Dr . Grawitz, taking care of special assignments.  
 In the fall of 1943 Poppendick was made Chief of the Personal Office of Grawitz, which position he retained until the end of the war . [Grawitz, the superior of Poppendick, was not included among those indicted in the 'Medical Case' ] .
10. Ibid., pp. 322-326.
11. N.M.T., vol. 2, p. 355.
12. I.M.T. Judgment, pp. 123-124.
13. N.M.T., loc. cit., p. 785.
14. N.M.T., ibid., pp. 790-791.
15. Transcript of the trial, p. 34. A report and commentary on the trial are published in L.R.U.N.W.C.C., vol. VI.

16. Three notorious persons in the relevant category who were not in the dock were: Franz Guertner, Minister of Justice in Hitler's Cabinet in 1933, died in 1941; Georg Thierack, Minister of Justice from August 1942 until the end of the war, committed suicide in October 1946; Roland Freisler, who succeeded Thierack as President of the infamous 'People's Court', was killed in an air raid shortly before the war ended (Source: Taylor, loc. cit., pp. 286-287).
17. Taylor loc. cit. p. 287.
18. L.R.U.N.W.C.C., vol. VI, p. 1.
19. N.M.T., vol. 3, pp. 974-978.
20. The content of this section hereafter, note 21 and Annexe 4, are based substantially upon the text of L.R.U.N.W.C.C., vol. VI, pp. 104-110.
21. In his reply, General Telford Taylor said: 'Legal concepts, analogous to that of conspiracy' are by no means unknown in continental law. [Thus, for instance, Article 265 of the French Code Penal provides that 'Any association formed, whatever its duration or the number of its members, and any undertaking arrived at for the purpose of preparing or committing crimes against persons or against property, constitutes a crime against the public peace'. This provision, inter alia, was relied upon in the trial of Henri Georges Stadelhofer by a French Military Tribunal at Marseilles, 15 April, 1948; in finding him guilty of the crime of association de malfaiteurs, among other offences, the Tribunal gave an affirmative answer to the question whether he, a German national, was guilty, during time of war, of 'having formed with various members of the German Gestapo an association with the aim of preparing or committing crimes against persons or property, without justification under the laws and usages of war.' Other accused war criminals have also been found guilty of association de malfaiteurs by French Military Tribunals. Source: L.R.U.N.W.C.C., ibid., p. 106]. General Taylor also submitted that: 'These and other internationally constituted Tribunals cannot work exclusively in the medium of German law, or American law, or even a combination of the two. This is not the genius of international law'.
22. The other two related cases were the 'Einsatzgruppen Case' and the 'RuSHA Case'.
23. N.M.T., vol. 5, p. 200.
24. Ibid., pp. 1168-1169.
25. Ibid., p. 1192.
26. Ibid., p. 1201.
27. Ibid., p. 1202.
28. Ibid., p. 1214.
29. N.M.T., vol. 98, p. 1098.
30. Ibid., pp. 1124-1127.
31. Pamphlet issued by the U.S.A. National Archives and Records Service, Washington, D.C., entitled 'Records of the United States Nuremberg War Crimes Trials: United States of America v. Wilhelm List et al. (case vii), July 8, 1947 - February 19, 1948', prepared and written by Marilla B. Guptil in collaboration with John Mendelsohn.
32. Taylor, op. cit., pp. 322-325.
33. Trial transcript, pp. 10441-42.

34. Ibid., p. 10439.
36. Ibid., pp. 10447-48.
37. Ibid., pp. 10454-55 and 10456-57.
38. Ibid., p. 10542.
39. Ibid., pp. 10513-14.
40. Ibid., pp. 10498, 10501.
41. Taylor, op. cit., p. 325.
42. Ibid., p. 297.
43. N.M.T., vol. 4, p. 599.
44. N.M.T., vol. 5, pp. 88-167.
45. Taylor, op. cit., p. 298.
46. The term literalty means 'deployed group' or 'committed group', but perhaps the most meaningful translation would be 'task unit'. (Taylor, ibid., p 98).
47. Transcript, p. 6648.
48. Ibid., p. 6769.
49. N.M.T, vol . 4, p. 457 .
50. Ibid., p. 1329.
51. N.M.T., Loc.cit., judgment at pp. 1435-1448.
52. Taylor, op.cit., p. 330.
53. N.M.T., vol. 14, pp. 317-318.
54. Ibid., p. 321 .
55. Ibid., p. 436.
56. Taylor, op. cit., pp. 334-335.
57. I.M.T. Judgment, pp. 38-42; N.M.T., vol. 11, pp. 470-484.
58. N.M.T., loc. cit., pp. 485-491.
59. Ibid., p. 491.
60. Ibid., p. 483.
61. Taylor, op. cit., p. 341.

62. See note 41.
63. Dinstein, E.P.I.L., vol. 3, p. 274, 'Military Necessity'.
64. See also Friedman (ed.), The Law of War, A Documentary History, vol. 1 (1972); preamble of Hague Convention II of 1899 with Respect of the Laws and Customs of War on Land. As Dinstein observed, loc. cit., p. 275: '... military necessity is admissible only within the scope of the following definition enunciated by the United States Military Tribunal, in the Hostages case, in 1948: "Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force, to compel the complete submission of the enemy with the least possible expenditure of time, life and money"'. The essential point made by Dinstein is that 'the key words in the definition are "subject to the laws of war"'. Professor N.C.H. Dunbar, in 'Military Necessity in War Crimes Trials', (1952) 29 B.Y.I.L., pp. 442-452, stated his conclusion in these terms:

The contribution of war crimes tribunals towards clarifying the meaning of military necessity has inevitably been determined by the nature of the cases brought before them. Nevertheless, if judicial precedent is to exercise an influence upon the development of the law of war, it is useful to extract some similarity of reasoning in the judgments that have been discussed. It seems likely that court will be disinclined to enlarge the doctrine of military necessity beyond that countenanced by express reservations appearing in the Hague and Geneva Conventions. The general principle is that belligerent's must always respect and observe customary and conventional rules of warfare. The first Article of each of the four Geneva Conventions of 1949 makes this clear. The Hague and Geneva Conventions were framed with due regard to the practical demands of military necessity, and the situations in which the rules therein laid down may be relaxed are strictly limited. Courts will not easily be persuaded to augment of their own accord the agreed exceptions to the general rule.

65. For a moderate comment on the 'High Command Case', see Jescheck, L.P.I.L., vol. 4, p. 55 et seq. By contrast, Brigadier General Taylor, op. cit., p. 340 relied on the conviction in the 'Ministries Case' of five of the accused on charges of 'crimes against peace' for the following comment: 'The Court's opinion in the "Ministries Case" on the aggressive war charge is an eloquent and effective restatement of the basic concept, but the factual situations with which it dealt fall well within the ambit of the I.M.T. judgment'. However, as indicated in the text, I would disagree with that conclusion on a comparison of the facts.
66. Jescheck, loc. cit., p. 56.
67. For a valuable review of the Nuremberg Trials as sources of recent German political and historical materials, see the publication by Dr. Robert M.W. Kempner, formerly U.S. Deputy Chief of Counsel, Nuremberg, reprinted from the American Political Science Review, vol. XLIV, No. 2, pp. 447-459, June 1950.

# ANNEXE 1 TO CHAPTER 13 CONTROL COUNCIL LAW NO.10: PUNISHMENT OF PERSONS GUILTY OF WAR CRIMES, CRIMES AGAINST PEACE AND AGAINST HUMANITY

In order to give effect to the terms of the Moscow Declaration of 30 October 1943 and the London Agreement of 8 August 1945, and the Charter issued pursuant thereto and in order to establish a uniform legal basis in Germany for the prosecution of war criminals and other similar offenders, other than those dealt with by the International Military Tribunal, the Control Council enacts as follows:

## Article I

The Moscow Declaration of 30 October 1943 "Concerning Responsibility of Hitlerites for Committed Atrocities" and the London Agreement of 8 August 1945 "Concerning Prosecution and Punishment of Major War Criminals of the European Axis" are made integral parts of this Law. Adherence to the provisions of the London Agreement by any of the United Nations, as provided for in Article V of that Agreement, shall not entitle such Nation to participate or interfere in the operation of this Law within the Control Council area of authority in Germany.

## Article II

1. Each of the following acts is recognized as a crime:

(a) Crimes against Peace. Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) War Crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) Crimes against Humanity. Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated.

(d) Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal.

2. Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime as defined in paragraph 1 of this Article, if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission or (e) was a member of any organization or group connected with the commission of any such crime or (f) with reference to paragraph 1 (a), if he held a high political, civil or military (including General Staff) position in Germany or in one of its Allies, co-belligerents or satellites or held high position in the financial, industrial or economic life of any such country.

3. Any person found guilty of any of the Crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:

(a) Death.

(b) Imprisonment for life or a term of years, with or without hard labour.

- (c) Fine, and imprisonment with or without hard labour, in lieu thereof.
- (d) Forfeiture of property.
- (e) Restitution of property wrongfully acquired.
- (f) Deprivation of some or all civil rights.

Any property declared to be forfeited or the restitution of which is ordered by the Tribunal shall be delivered to the Control Council for Germany, which shall decide on its disposal.

4. (a) The official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment.

(b) The fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation.

5. In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945, nor shall any immunity, pardon or amnesty granted under the Nazi regime be admitted as a bar to trial or punishment.

### Article III

1. Each occupying authority, within its Zone of occupation,
  - (a) shall have the right to cause persons within such Zone suspected of having committed a crime, including those charged with crime by one of the United Nations, to be arrested and shall take under control the property, real and personal, owned or controlled by the said persons, pending decisions as to its eventual disposition.
  - (b) shall report to the Legal Directorate the names of all suspected criminals, the reasons for and the places of their detention, if they are detained, and the names and location of witnesses.
  - (c) shall take appropriate measures to see that witnesses and evidence will be available when required,
  - (d) shall have the right to cause all persons so arrested and charged, and not delivered to another authority as herein provided, or released, to be brought to trial before an appropriate tribunal. Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.
2. The tribunal by which persons charged with offenses hereunder shall be tried and the rules and procedure thereof shall be determined or designated by each Zone Commander for his respective Zone. Nothing herein is intended to, or shall impair or limit the jurisdiction or power of any court or tribunal now or hereafter established in any Zone by the Commander thereof, or of the International Military Tribunal established by the London Agreement of 8 August 1945.
3. Persons wanted for trial by an International Military Tribunal will not be tried without the consent of the Committee of Chief Prosecutors. Each Zone Commander will deliver such persons who are within his Zone to that committee upon request and will make witnesses and evidence available to it.
4. Persons known to be wanted for trial in another Zone or outside Germany will not be tried prior to decision under Article IV unless the fact of their apprehension has been reported in accordance with Section 1 (b) of this Article, three months have elapsed thereafter, and no request for delivery of the type contemplated by Article IV has been received by the Zone Commander concerned.
5. The execution of death sentences may be deferred by not to exceed one month after the sentence has

become final when the Zone Commander concerned has reason to believe that the testimony of those under sentence would be of value in the investigation and trial of crimes within or without his Zone .

6. Each Zone Commander will cause such effect to be given to the judgments of courts of competent jurisdiction, with respect to the property taken under his control pursuant hereto, as he may deem proper in the interest of justice.

#### Article IV

1. When any person in a Zone in Germany is alleged to have committed a crime, as defined in Article II, in a country other than Germany or in another Zone, the government of that nation or the Commander of the latter Zone, as the case may be, may request the Commander of the zone in which the person is located for his arrest and delivery for trial to the country or Zone in which the crime was committed. Such request for delivery shall be granted by the Commander receiving it unless he believes such person is wanted for trial or as a witness by an International Military Tribunal, or in Germany, or in a nation other than the one making the request, or the Commander is not satisfied that delivery should be made, in any of which cases he shall have the right to forward the said request to the Legal Directorate of the Allied Control Authority. A similar procedure shall apply to witnesses, material exhibits and other forms of evidence.
2. The Legal Directorate shall consider all requests referred to it, and shall determine the same in accordance with the following principles, its determination to be communicated to the Zone Commander.
  - (a) A person wanted for trial or as a witness by an International Military Tribunal shall not be delivered for trial or required to give evidence outside Germany, as the case may be, except upon approval of the Committee of Chief Prosecutors acting under the London Agreement of 8 August 1945.
  - (b) A person wanted for trial by several authorities (other than an International Military Tribunal) shall be disposed of in accordance with the following priorities:
    - (1) If wanted for trial in the Zone in which he is, he should not be delivered unless arrangements are made for his return after trial elsewhere
    - (2) If wanted for trial in a Zone other than that in which he is, he should be delivered to that Zone in preference to delivery outside Germany unless arrangements are made for his return to that Zone after trial elsewhere.
    - (3) If wanted for trial outside Germany by two or more of the United Nations, of one of which he is a citizen, that one should have priority;
    - (4) If wanted for trial outside Germany by several countries, not all of which are United Nations, United Nations should have priority;
    - (5) If wanted for trial outside Germany by two or more of the United Nations, then, subject to Article IV 2 (b) (3) above, that which has the most serious charges against him, which are moreover supported by evidence, should have priority.

#### Article V

The delivery, under Article IV of this law, of persons for trial shall be made on demands of the Governments or Zone Commanders in such a manner that the delivery of criminals to one jurisdiction will not become the means of defeating or unnecessarily delaying the carrying out of justice in another place. If within six months the delivered person has not been convicted by the Court of the zone or country to which he has been delivered, then such person shall be returned upon demand of the Commander of the Zone where the person was located prior to delivery.

Done at Berlin, 20 December 1945.

## ANNEXE 2 TO CHAPTER 13 MILITARY GOVERNMENT - GERMANY UNITED STATES ZONE ORDINANCE NO. 7

### ORGANIZATION AND POWERS OF CERTAIN MILITARY TRIBUNALS

#### Article I

The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes. Nothing herein shall prejudice the jurisdiction or the powers of other courts established or which may be established for the trial of any such offenses.

#### Article II

- (a) Pursuant to the powers of the Military Governor for the United States Zone of Occupation within Germany and further pursuant to the powers conferred upon the Zone Commander by Control Council Law No. 10 and Articles 10 and 11 of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945 certain tribunals to be known as "Military Tribunals" shall be established hereunder.
- (b) Each such tribunal shall consist of three or more members to be designated by the Military Governor. One alternate member may be designated to any tribunal if deemed advisable by the Military Governor. Except as provided in subsection (c) of this Article, all members and alternates shall be lawyers who have been admitted to practice, for at least five years, in the highest courts of one of the United States or its territories or of the District of Columbia, or who have been admitted to practice in the United States Supreme Court.
- (c) The Military Governor may in his discretion enter into an agreement with one or more other zone commanders of the member nations of the Allied Control Authority providing for the joint trial of any case or cases. In such cases the tribunals shall consist of three or more members as may be provided in the agreement. In such cases the tribunals may include properly qualified lawyers designated by the other member nations.
- (d) The Military Governor shall designate one of the members of the tribunal to serve as the presiding judge.
- (e) Neither the tribunals nor the members of the tribunals or the alternates may be challenged by the prosecution or by the defendants or their counsel.
- (f) In case of illness of any member of a tribunal or his incapacity for some other reason, the alternate, if one has been designated, shall take his place as a member in the pending trial. Members may be replaced for reasons of health or for other good reasons, except that no replacement of a member may take place, during a trial, other than by the alternate. If no alternate has been designated, the trial shall be continued to conclusion by the remaining members.
- (g) The presence of three members of the tribunal or of two members when authorized pursuant to subsection (f) supra shall be necessary to constitute a quorum. In the case of tribunals designated under (c) above the agreement shall determine the requirements for a quorum.
- (h) Decisions and judgments, including convictions and sentences, shall be by majority vote of the members. If the votes of the members are equally divided, the presiding member shall declare a mistrial.

#### Article III

- (a) Charges against persons to be tried in the tribunals established hereunder shall originate in the Office of the Chief of Counsel for War Crimes, appointed by the Military Governor pursuant to paragraph 3 of the Executive Order Numbered 9679 of the President of the United States dated 16 January 1946. The Chief of



Counsel for War Crimes shall determine the persons to be tried by the tribunals and he or his designated representative shall file the indictments with the Secretary General of the tribunals (see Article XIV, *infra*) and shall conduct the prosecution.

- (b) The Chief of Counsel for War Crimes, when in his judgment it is advisable, may invite one or more United Nations to designate representatives to participate in the prosecution of any case.

#### Article IV

In order to ensure fair trial for the defendants, the following procedure shall be followed:

- (a) A defendant shall be furnished, at a reasonable time before his trial, a copy of the indictment and of all documents lodged with the indictment, translated into a language which he understands. The indictment shall state the charges plainly, concisely and with sufficient particulars to inform defendant of the offenses charged.
- (b) The trial shall be conducted in, or translated into, a language which the defendant understands.
- (c) A defendant shall have the right to be represented by counsel of his own selection, provided such counsel shall be a person qualified under existing regulations to conduct cases before the courts of defendant's country, or any other person who may be specially authorized by the tribunal. The tribunal shall appoint qualified counsel to represent a defendant who is not represented by counsel of his own selection.
- (d) Every defendant shall be entitled to be present at his trial except that a defendant may be proceeded against during temporary absences if in the opinion of the tribunal defendant's interests will not thereby be impaired, and except further as provided in Article VI (c). The tribunal may also proceed in the absence of any defendant who has applied for and has been granted permission to be absent.
- (e) A defendant shall have the right through his counsel to present evidence at the trial in support of his defense, and to cross-examine any witness called by the prosecution.
- (f) A defendant may apply in writing to the tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located and shall also state the facts to be proved by the witness or the document and the relevancy of such facts to the defense. If the tribunal grants the application, the defendant shall be given such aid in obtaining production of evidence as the tribunal may order.

#### Article V

The tribunals shall have the power

- (a) to summon witnesses to the trial, to require their attendance and testimony and to put questions to them;
- (b) to interrogate any defendant who takes the stand to testify in his own behalf, or who is called to testify regarding another defendant;
- (c) to require the production of documents and other evidentiary material;
- (d) to administer oaths;
- (e) to appoint officers for the carrying out of any task designated by the tribunals including the taking of evidence on commission;
- (f) to adopt rules of procedure not inconsistent with this Ordinance. Such rules shall be adopted, and from time to time as necessary, revised by the members of the tribunal or by the committee of presiding judges as provided in Article XIII.

## Article VI

The tribunals shall

- (a) confine the trial strictly to an expeditious hearing of the issues raised by the charges;
- (b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever;
- (c) deal summarily with any contumacy, imposing appropriate punishment, including the exclusion of any defendant or his counsel from some or all further proceedings, but without prejudice to the determination of the charges.

## Article VII

The tribunals shall not be bound by technical rules of evidence. They shall adopt and apply to the greatest possible extent expeditious and nontechnical procedure, and shall admit any evidence which they deem to have probative value. Without limiting the foregoing general rules, the following shall be deemed admissible if they appear to the tribunal to contain information of probative value relating to the charges: affidavits, depositions, interrogations, and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals and the reviewing and confirming authorities of any of the United Nations, and copies of any document or other secondary evidence of the contents of any document, if the original is not readily available or cannot be produced without delay. The tribunal shall afford the opposing party such opportunity to question the authenticity or probative value of such evidence as in the opinion of the tribunal the ends of justice require.

## Article VIII

The tribunals may require that they be informed of the nature of any evidence before it is offered so that they may rule upon the relevance thereof.

## Article IX

The tribunals shall not require proof of facts of common knowledge but shall take judicial notice thereof. They shall also take judicial notice of official governmental documents and reports of any of the United Nations, including the acts and documents of the committees set up in the various Allied countries for the investigation of war crimes, and the records and findings of military or other tribunals of any of the United Nations.

## Article X

The determinations of the International Military Tribunal in the judgment in Case No. 1 that invasions, aggressive acts, aggressive wars, crimes, atrocities or inhumane acts were planned or occurred, shall be binding on the tribunals established hereunder and shall not be questioned except insofar as the participation therein or knowledge thereof by any particular person may be concerned. Statements of the International Military Tribunal in the judgment in Case No. 1 constitute proof of the facts stated, in the absence of substantial new evidence to the contrary.

## Article XI

The proceedings at the trial shall take the following course:

- (a) The tribunal shall inquire of each defendant whether he has received and had an opportunity to read the indictment against him and whether he pleads "guilty" or "not guilty".
- (b) The prosecution may make an opening statement.
- (c) The prosecution shall produce its evidence subject to the cross examination of its witnesses.
- (d) The defense may make an opening statement.

- (e) The defense shall produce its evidence subject to the cross examination of its witnesses
- (f) Such rebutting evidence as may be held by the tribunal to be material may be produced by either the prosecution or the defense.
- (g) The defense shall address the court.
- (h) The prosecution shall address the court.
- (i) Each defendant may make a statement to the tribunal.
- (j) The tribunal shall deliver judgment and pronounce sentence.

#### Article XII

A Central Secretariat to assist the tribunals to be appointed hereunder shall be established as soon as practicable. The main office of the Secretariat shall be located in Nuremberg. The Secretariat shall consist of a Secretary General and such assistant secretaries, military officers, clerks, interpreters and other personnel as may be necessary.

#### Article XIII

The Secretary General shall be appointed by the Military Governor and shall organize and direct the work of the Secretariat. He shall be subject to the supervision of the members of the tribunals, except that when at least three tribunals shall be functioning, the presiding judges of the several tribunals may form the supervisory committee.

#### Article XIV

The Secretariat shall:

- (a) Be responsible for the administrative and supply needs of the Secretariat and of the several tribunals.
- (b) Receive all documents addressed to tribunals.
- (c) Prepare and recommend uniform rules of procedure, not inconsistent with the provisions of this Ordinance.
- (d) Secure such information for the tribunals as may be needed for the approval or appointment of defense counsel.
- (e) Serve as liaison between the prosecution and defense counsel.
- (f) Arrange for aid to be given defendants and the prosecution in obtaining production of witnesses or evidence as authorized by the tribunals.
- (g) Be responsible for the preparation of the records of the proceedings before the tribunals.
- (h) Provide the necessary clerical, reporting and interpretative services to the tribunals and its members, and perform such other duties as may be required by any of the tribunals.

#### Article XV

The judgments of the tribunals as to the guilt or the innocence of any defendant shall give the reasons on which they are based and shall be final and not subject to review. The sentences imposed may be subject to review as provided in Article XVII, *infra*.

### Article XVI

The tribunal shall have the right to impose upon the defendant, upon conviction, such punishment as shall be determined by the tribunal to be just which may consist of one or more of the penalties provided in Article II, Section 3 of Control Council Law No. 10.

### Article XVII

- (a) Except as provided in (b) infra, the record of each case shall be forwarded to the Military Governor who shall have the power to mitigate, reduce or otherwise alter the sentence imposed by the tribunal, but may not increase the severity thereof.
- (b) In cases tried before tribunals authorised by Article II (c), the sentence shall be reviewed jointly by the zone commanders of the nations involved, who may mitigate, reduce or otherwise alter the sentence by majority vote, but may not increase the severity thereof. If only two nations are represented, the sentence may be altered only by the consent of both zone commanders.

### Article XVIII

No sentence of death shall be carried into execution unless and until confirmed in writing by the Military Governor. In accordance with Article III, Section 5 of Law No. 10, execution of the death sentence may be deferred by not to exceed one month after such confirmation if there is reason to believe that the testimony of the convicted person may be of value in the investigation and trial of other crimes.

### Article XIX

Upon the pronouncement of a death sentence by a tribunal established thereunder and pending confirmation thereof, the condemned will be remanded to the prison or place where he was confined and there be segregated from the other inmates, or be transferred to a more appropriate place of confinement.

### Article XX

Upon the confirmation of a sentence of death the Military Governor will issue the necessary orders for carrying out the execution.

### Article XXI

Where sentence of confinement for a term of years has been imposed the condemned shall be confined in the manner directed by the tribunal imposing sentence. The place of confinement may be changed from time to time by the Military Governor.

### Article XXII

Any property declared to be forfeited or the restitution of which is ordered by a tribunal shall be delivered to the Military Governor, for disposal in accordance with Control Council Law No. 10, Article II (3).

### Article XXIII

Any of the duties and functions of the Military Governor provided for herein may be delegated to the Deputy Military Governor. Any of the duties and functions of the Zone Commander provided for herein may be exercised by and in the name of the Military Governor and may be delegated to the Deputy Military Governor.

This Ordinance becomes effective 18 October 1946.

| Case No. | United States of America against | Popular name        | Volume No.         |
|----------|----------------------------------|---------------------|--------------------|
| 1        | Karl Brandt, et al.              | Medical Case        | I and II           |
| 2        | Erhard Milch                     | Milch Case          | II                 |
| 3        | Josef Altstoetter, et al.        | Justice Case        | III                |
| 4        | Oswald Pohl, et al.              | Pohl Case           | V                  |
| 5        | Friedrich Flick, et al.          | Flick Case          | VI                 |
| 6        | Carl Krauch, et al.              | I.G. Farben Case    | VII and VIII       |
| 7        | Wilhelm List, et al.             | Hostage Case        | XI                 |
| 8        | Ulrich Greifelt, et al.          | RuSHA Case          | IV and V           |
| 9        | Otto Ohlendorf, et al.           | Einsatzgruppen Case | IV                 |
| 10       | Alfried Krupp, et al.            | Krupp Case          | IX                 |
| 11       | Ernst von Weizsaecker, et al.    | Ministries Case     | XII, XIII, and XIV |
| 12       | Wilhelm von Leeb, et al.         | High Command Case   | X and XI           |
|          | Procedure                        |                     | XV                 |

---

Arrangement by subject units for publication\*

| Case No.                                 | United States of America against       | Popular name        | Volume No.   |
|--|--|---------------------|--------------|
| <b>Medical</b>                           |  |                     |              |
| 1  | Karl Brandt, et al.                    | Medical Case        | I and II     |
| 2  | Erhard Milch                           | Milch Case          | II           |
| <b>Legal</b>                             |  |                     |              |
| 3  | Josef Altstoetter, et al.<br>Procedure | Justice Case        | III<br>XV    |
| <b>Ethnological (Nazi Racial Policy)</b> |  |                     |              |
| 9  | Otto Ohlendorf, et al.                 | Einsatzgruppen Case | IV           |
| 8  | Ulrich Greifelt, et al.                | RuSHA Case          | IV and V     |
| 4  | Oswald Pohl, et al.                    | Pohl Case           | V            |
| <b>Economic</b>                          |  |                     |              |
| 5  | Friedrich Flick, et al.                | Flick Case          | VI           |
| 6  | Carl Krauch, et al.                    | I.G. Farben Case    | VII and VIII |
| 10                                       | Alfried Krupp, et al.                  | Krupp Case          | IX           |
| <b>Military</b>                          |  |                     |              |
| 7  | Wilhelm List, et al.                   | Hostage Case        | XI           |
| 12                                       | Wilhelm von Leeb, et al.               | High Command        | X and XI     |

## Case

## Political and Government

11 Ernst von Weizsaecker, et al. Ministries XII, XIII and XIV

\* Although the subject material in many of the cases overlaps, it was believed that this arrangement of the cases would be most helpful to the reader and the most feasible for publication purposes.

[Source: Trials of War Criminals before the Nuernberg Military Tribunals, United States Government Printing Office, Washington, 1952].

#### ANNEXE 4 TO CHAPTER 13 PRINCIPAL LEGAL SUBMISSIONS BY COUNSEL IN RELATION TO THE CHARGE OF CONSPIRACY

As stated in the text of this chapter, a joint sitting of five United States Military Tribunals was specially convened on 9 July 1947 to hear argument from counsel in relation to the Count of conspiracy. Because of the importance of the ruling, the principal submissions of counsel are summarised in this Annexe as follows:

- (i) neither the Charter of the International Military Tribunal nor Law No. 10, in dealing with war crimes and crimes against humanity, 'speak of common planning as a punishable separate crime, whereas both laws have in common that in their respective figure (a), dealing with the crimes against peace, participation in a common plan or conspiracy for the accomplishment of one of the listed crimes against the peace, is expressly declared punishable';
- (ii) the International Military Tribunal held that whereas the prosecution [that is, the indictment] in the trial of the German major war criminals charged a conspiracy to commit not only aggressive war but also war crimes and crimes against humanity, the Charter did not in fact define as a crime any conspiracy except the one to commit acts of aggressive war;
- (iii) the wording 'was connected with plans or enterprises involving its commission' contained in Article II, 2 (d) of Law No. 10 could not be taken to admit charges of conspiracy to commit war crimes and crimes against humanity since 'the system of Law No. 10 makes it clear beyond doubt that the facts of crimes are exhaustively defined in sub-paragraph 1, whereas in sub-paragraph 2 only the forms of complicity in these crimes are defined';
- (iv) The occupation of Germany was carried out together by the four victorious Powers, who according to the Berlin declaration have confirmed again and again that Germany is to be neither annexed nor divided up but on the contrary to be maintained as an entity of which the political form is to be determined. Consequently, Germany is subject to the united occupation Powers as represented in the Control Council, but not to the Russian, the English, the French, the American law as such'. The introduction of the Anglo-American concept of conspiracy was not therefore admissible;
- (v) the words 'including conspiracy to commit any such crimes', contained in Article 1 of Ordinance No. 7, must be taken to mean only conspiracy to commit crimes against peace, since Ordinance No. 7 did not set out to alter matters of substantive law contained in Law No. 10;
- (vi) the concept of conspiracy is not found in modern continental codes, and is an Anglo-American notion. It would therefore be a violation of the maxim *nullum crimen sine lege* to apply it to German accused.

The principal prosecution arguments, as presented by General Taylor, were the following:

- (i) The classical definition of conspiracy at English common law is that it is a confederation to effect an unlawful object, or to effect a lawful object by unlawful means. Within the scope of this definition, conspiracy is very little more than an elaboration of the law of attempts, in cases where the conspiracy was unsuccessful in attaining its object, or of the law of principals and accessories and accomplices, if the conspiracy succeeded in attaining an unlawful object. Within this sphere, the law of conspiracy is really just another manifestation of the very familiar problem in all legal systems of how closely or in what way an individual must be connected with a crime in order to attribute to him, in a judicial sense, guilt. ... However, over the course of years there have occurred, both in English common law and in the continental law, a number of efforts to apply the doctrine of conspiracy to acts which, if committed by a single person, would not have been indictable or, in a judicial sense, unlawful ... it is important to point out, therefore, that none of these questionable and perhaps dangerous developments of the law of conspiracy are in any way involved under the London Charter or under Law No. 10, or in any of the three cases before these tribunals in which this jurisdictional question is raised. Neither one, neither the London Charter nor these indictments, seeks to impose criminal liability for conspiring in pursuit of a lawful objective. On the contrary, the conspiracies

involved in these cases are conspiracies to commit acts well established as crimes at international law, under the specific language of the London Charter and Law No. 10 and, in most cases, under the penal law system of all civilised countries. Moreover, these were crimes which according to the claim of the prosecution had in fact been committed.

- (ii) All systems of law had 'concepts, such as accessories, accomplices, conspirators, etc.', whose purpose was to ensure that all connected with a crime should be punished, and in approaching the question of what degree of connection with these crimes must be established in order to attribute guilt to a defendant, we must not become enmeshed in the intricacies of the American or English law of principals and accessories, or of conspiracy, or indeed in the refinements or peculiar prejudices of any single judicial system. International law, with respect to these questions, must be derived and applied from a variety of sources and legal systems, including both civil and common law. And the notion of conspiracy, if sensibly and fairly confined, is, we submit, a useful body of doctrine to draw upon.
- (iii) The law of war crimes is, fundamentally, an attempt to define the circumstances under which a state of belligerent hostilities makes lawful acts which would otherwise be clearly unlawful, acts such as murder, torture, enslavement, rape, plunder, destruction, devastation, etc. It is well settled, and we think this is an important point, that a conspiracy to commit felonies of these types is an indictable offence at common law, and regardless of whether any statute expressly so provides. This has been settled in a multitude of English and American decisions over a number of years. It was, undoubtedly, for this reason that the draftsmen of the London Charter and Control Council Law No. 10 saw no need to include an express reference to conspiracy in the definition of war crimes and crimes against humanity, any more than they felt it necessary to make express reference to the liability of accessories and accomplices or to the law of attempts. All these things adhere to such crimes automatically.

Why, then, did the draftsmen of the London Charter make specific reference to 'common plan or conspiracy' in the definition of crimes against peace? Clearly, we submit, this was done out of abundance of caution because of certain differences between the nature of crimes against peace on the one hand and war crimes and crimes against humanity on the other hand. ... But the crime of planning and waging an aggressive war is, in many respects, peculiarly an international law crime, and particularly subject to international jurisdiction. The acts condemned as criminal in the definition of crimes against peace are not acts which are declared to be criminal under the internal penal law of most States. Furthermore, while war crimes and crimes against humanity can certainly be committed by a single individual, it is hard to think of any one man as committing the crime of waging an aggressive war as a solo venture. It is peculiarly a crime brought about by the confederation or conspiracy of a number of men acting pursuant to well-laid plans. It matures over a long period of time, and many steps are involved in its consummation. The interrelations between the confederates or conspirators are likely to be extremely complicated and far-flung. For all these reasons, and particularly because planning an aggressive war is not, like murder, a standard felony to which the orthodox paraphernalia of doctrine as to the liability of accomplices automatically applies, the draftsmen of the London Charter and Law No. 10 included an express reference to conspiracy in the definition of crimes against peace.

- (iv) I am sure that it never occurred to the Allied Control Council when it adopted Law No. 10 in December, 1945, during the proceedings before the International Military Tribunal, that by following the language of the London Charter they had excluded from the scope of Law No. 10 conspiracies to commit war crimes and crimes against humanity. And finally, so far as I am aware, such an idea never occurred to any of the defence counsel during the entire course of the international trial. ... The International Military Tribunal came to the decision quoted above because of an underlying hostility, particularly on the part of the continental members of the court, to the concept of conspiracy as such. The Military Tribunal should refuse to follow this ruling, which [seems] to be contrary to the express language of Article 6 of the Charter of the International Military Tribunal which stated that: 'Leaders, organisers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.' Ordinance No. 7, under which these Tribunals are constituted, does not make the decisions of the International Military Tribunal on points of law binding.
- (v) Article II, (2) of Law No. 10 was differently worded from the passage just quoted from the Charter, but its purpose is fundamentally the same. ... Indeed, the scope of paragraph 2 of Article II of Control



Council Law No. 10 which I have just quoted is, we believe, broader than that of the doctrine of conspiracy.

- (vi) In applying international penal law, just as in applying domestic penal law, we must determine the substantial degree or quality of participation in crimes upon the basis of which a fair judgment of guilt must be rendered. And in making these determinations under international law, it is surely not only appropriate but wise to draw upon such well-established bodies of legal doctrine in highly developed legal systems as will assist us in arriving at a result which commends itself to our sense of justice. The International Military Tribunal did not find that any considerations of general jurisprudence stood in the way of applying the doctrine of conspiracy in the case of crimes against peace.
- (vii) Conspiracy to achieve an unlawful objective or to use unlawful means to attain an objective is not, properly speaking, a separate subsequent crime at all, any more than being an accessory or an accomplice is a crime; it is an adjunct of the crime;
- (viii) It is important, also, to bear in mind that neither the London Charter nor Law No. 10 purports to be a complete, or even a nearly complete codification of international penal law ... Particularly in respect to the necessary degree of connection with a crime, the provisions of the London Charter and Law No. 10 are illustrative rather than exhaustive attempts at statutory definition. Neither of them, for example, makes mention of attempts, yet it surely was not the intention in either case to eliminate attempts from international penal law.
- (ix) Ordinance No. 7 expressly makes conspiracy punishable.

Source: Nuremberg Military Tribunals series, transcript, passim.

## CHAPTER 14 THE AUSTRALIAN ROAD TO THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST: COMPARISON BETWEEN 'NUREMBERG LAW' AND 'TOKYO LAW'

### INTRODUCTION

It is beyond the scope of this study to consider in detail the deliberations and judgments (including the dissenting judgments) of the International Military Tribunal for the Far East (Tokyo Tribunal). Consequently, the discussion in this chapter is confined essentially to the following matters:

- (a) The preliminary official steps taken by Australia to investigate war crimes committed in the widespread areas in which the Japanese Armed Forces were involved;
- (b) The establishment and jurisdiction of the Tokyo Tribunal, including a comparison with the jurisdictional basis for the Nuremberg Tribunal;
- (c) The relevance of the Tokyo Tribunal in the development of principles of public international law in relation to trial and punishment of war criminals;
- (d) The broad approach of successive Australian Governments to the treatment, as a matter of law, of Japanese war criminals; and
- (e) A consideration of the criticism of the Tokyo Tribunal.

It is not practicable, or of any direct relevance, to extend the limits of the discussion to the proceedings conducted between 1945 and May 1951 before numerous mixed inter-Allied military courts, appointed pursuant to the Australian War Crimes Act 1945. Those proceedings did not involve principles of public international law and were almost solely confined to allegations of atrocities.<sup>1</sup> For the same reasons, reference is not made to the trials in the Pacific theatre conducted by special United States commissions, such as those which tried General Yamashita and General Homma in the Philippines.<sup>2</sup>

### INITIAL AUSTRALIAN STEPS TOWARDS THE TRIALS OF JAPANESE

On 23 June 1943 Sir William Webb, then Chief Justice of Queensland, was appointed a Commissioner under the National Security (Inquiries) Regulations to inquire into and report whether there had been atrocities or breaches of the rules of warfare on the part of the Japanese Armed Forces in or in the neighbourhood of New Guinea or Papua, and what evidence was available of any such atrocities or breaches. Sir William Webb submitted his report on 21 March 1944.

On 8 June 1944 a further commission, under the same regulations, was issued to Sir William Webb to inquire into and report whether there had been any war crimes on the part of individual members of the Armed Forces of the enemy against any persons who were resident in Australia prior to World War II (whether members of the forces or not) which in his opinion should be communicated by the Commonwealth Government to the United Nations War Crimes Commission, and what evidence was available of any such war crimes. Under that commission Sir William Webb heard evidence in Australia and furnished a report. He then visited London for discussions with members and senior legal advisers of the British Government and the United Nations War Crimes Commission, British judges and lawyers. The discussions involved the question of the relaxation of the strict rules of evidence in the case of war crimes trials and no doubt were the genesis of some of the provisions of the Australian War Crimes Act 1945. Following the surrender of Japan on 2 September 1945, the Commonwealth Government, on 3 September 1945, appointed Sir William Webb, Mr. Justice Mansfield, of the Supreme Court of Queensland, and His Honour, Richard Clarence Kirby, a Judge of District Courts of New

South Wales, to be a Board of Inquiry,<sup>3</sup> under the same regulations, to inquire into and report on the following matters (except insofar as the matters had already been inquired into by Sir William Webb):

- (i) Whether any war crimes had been committed by any subjects of any State with which His Majesty had been engaged at war since 2 September 1939 against any persons who were resident in Australia prior to the commencement of any such war, whether members of the defence forces or not, or against any British subject or against any citizen of an allied nation;
- (ii) If any war crimes had been so committed, whether, in the opinion of the Board, particulars thereof should be communicated by the Commonwealth Government to the United Nations Commission for the investigation of war crimes; and
- (iii) What evidence was available of such war crimes.

The instrument of appointment of the Board of Inquiry defined a 'war crime' as including any of thirty five categories of acts, the most significant of which was the repetition in identical terms of Article 6(a) of the London Charter of 8 August 1945 relating to crimes against peace. The definition included most of the other crimes specified in other paragraphs of Article 6 of the London Charter, but was more expansive, to the extent of including cannibalism.

The National Security (Inquiries) Regulations provided that the members of the Board could inform their minds in any manner they thought fit and were not bound by the rules of evidence. The Board stated in its report:<sup>4</sup>

... The effect of this is to prevent the Board from being regarded as a judicial body. In any event, as the Board takes evidence *ex parte* and the witnesses are not subjected to cross-examination, the Board cannot make a finding against any specific individual. The Board does not try the Japanese; it merely finds as an administrative body whether a war crime has been committed, and, if it has, produces the evidence ... Actually, then, the Board does not make any finding against any war criminal, whether he be a major war criminal or an ordinary war criminal ... The Board is not in a position to say whether the evidence it collects should be believed or not by the tribunals that will try the war criminals. It merely passes on this evidence with its own conclusions, on the assumption that it is true but without finding that it is true.

Much of the material considered by the Board originated in responses by members of the Australian Armed Forces, many of whom had been Prisoners of war, to a printed questionnaire, some 40,000 copies of which were distributed.

In its report, dated 31 January 1946, the Board presented evidence, both general and specific, relating to war crimes within its jurisdiction. Just prior to that date, Sir William Webb had been nominated as Australian representative on the Tokyo Tribunal and Mr. Justice Mansfield had been appointed Chief Australian Prosecutor and Associate Prosecutor with those of the other nations that were to be represented on the international tribunal.

It is clear that the first two reports by Sir William Webb as a sole Commissioner and the appointment of the Board of Inquiry paved the way for the enactment by the Federal Parliament of the War Crimes Act 1945, leading to the establishment of the War Crimes Courts which exercised jurisdiction in or near the South Pacific area until 1951. More importantly, the three inquiries, and the associated liaison with the United Nations War Crimes Commission, including the appointment of Mr. Justice Mansfield as an additional member of that Commission,<sup>5</sup> projected Australia into a leading role in relation to the prosecution of war criminals in the Far East and, it would appear, led to the appointment of Sir William Webb as President of the Tokyo Tribunal.

## THE ESTABLISHMENT OF THE TOKYO TRIBUNAL

As in the case of Nuremberg, the preliminary discussions concerning the nature and scope of the Tokyo Tribunal were dominated by American attitudes. The concept of conspiracy relating to the planning, preparation, initiation or waging of a war of aggression was again fundamental. The maintenance of such a concept was inevitable. As Judge Roling, the Netherlands member of the Tokyo Tribunal, wrote in 1982:<sup>6</sup>

The precedent of the Nuremberg trial compelled the Allied powers to prosecute Japanese leaders for the crime against peace. Had this charge been omitted, the conclusion might have been that this war had not been an aggressive one. Therefore prosecution could only have been for misbehaviour during the war, consisting of grave violations of the laws and customs of war.

However, the framers of the Charter of the Tokyo Tribunal did not seek to pursue the question of the criminal guilt of groups or organisations which, under the London Charter of 8 August 1945, was a novel feature of the Nuremberg proceedings.

The development of the Tokyo Charter was not marked by the political disputation which prevailed in the discussions among representatives of the Allied Powers in London in June and July 1945 as a prelude to the execution of the London Agreement and Charter of 8 August 1945. The American authorities -- principally the Co-ordinating Committee of the Departments of State, War and Navy -- had prepared a memorandum which expressed the policy of the United States 'in regard to the apprehension and punishment of war criminals in the Far East'. That memorandum was communicated to America's allies on 18 October 1945, the same day on which the Nuremberg indictment was presented to the International Military Tribunal at Berlin.<sup>7</sup>

It is difficult to appreciate the reason why, among the vast trial documentation and many commentaries by writers, some critical and some approbative, relating to the Tokyo Tribunal, an essential analytical distinction between the Nuremberg and Tokyo Tribunals has not been emphasised. That distinction concerns the juridical character of the respective tribunals.

The jurisdictional basis for the Nuremberg Tribunal was an executive agreement between the governments of the four major Allied Powers, although in the title of the Tribunal it was described as 'Military'. In the case of the Tokyo Tribunal, its genesis was a special proclamation issued at Tokyo on 19 January 1946 by General MacArthur under the title of 'General of the Army, United States Army Supreme Commander for the Allied Powers'. It is desirable to cite the proclamation verbatim in the text before discussing it:<sup>8</sup>

### SPECIAL PROCLAMATION ESTABLISHMENT OF AN INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

WHEREAS, the United Kingdom and the Nations allied therewith in opposing the illegal wars of aggression of the Axis Nations, have from time to time made declarations of their intentions that war criminals should be brought to justice;

WHEREAS, the Governments of the Allied Powers at war with Japan on the 26th. July 1945 at Potsdam, declared as one of the terms of surrender that stern justice shall be meted out to all war criminals including those who have visited cruelties upon our prisoners;

WHEREAS, by the Instrument of Surrender of Japan executed at Tokyo Bay, Japan, on the 2nd. September 1945, the signatories for Japan, by command of and in behalf of the Emperor and the Japanese Government accepted the terms set forth in such declaration at Potsdam;

WHEREAS, by such Instrument of Surrender, the authority of the Emperor and the Japanese Government to rule the state of Japan is made subject to the Supreme Commander for the Allied Powers, who is

authorised to take such steps as he deems proper to effectuate the terms of surrender;

WHEREAS, the undersigned has been designated by the Allied Powers as Supreme Commander for the Allied Powers to carry into effect the general surrender of the Japanese armed forces;

WHEREAS, the Governments of the United States, Great Britain and Russia at the Moscow Conference, 26th. December 1945, having considered the effectuation by Japan of the Terms of Surrender, with the concurrence of China have agreed that the Supreme Commander shall issue all orders for the implementation of the Terms of Surrender;

NOW, THEREFORE, I, Douglas MacArthur, as Supreme Commander for the Allied Powers, by virtue of the authority so conferred upon me, in order to implement the Term of Surrender which requires the meting out of stern justice to war criminals, do order and provide as follows:

ARTICLE 1. There shall be established an International Military Tribunal for the Far East for the trial of those persons charged individually, or as members of organisations, or in both capacities, with offences which include crimes against peace.

ARTICLE 2. The Constitution, jurisdiction and functions of this Tribunal are those set forth in the charter of the International Military Tribunal for the Far East, approved by me this day.

ARTICLE 3. Nothing in this Order shall prejudice the jurisdiction of any other international, national or occupation court, commission or other tribunal established or to be established in Japan or in any territory of a United Nation with which Japan has been at war, for the trial of war criminals.

The legal basis for the Special Proclamation was derived from two crucial sources: first, the Berlin (Potsdam) Conference, 17 July - 2 August 1945, at which a proclamation by the heads of government of the United States, China and Great Britain was approved on 26 July 1945 (often referred to as the Potsdam Declaration, 26 July 1945);<sup>9</sup> second, the instrument, dated 2 September 1945, whereby Japan proclaimed the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and armed forces under Japanese control wherever situated.<sup>10</sup>

The Potsdam Declaration, which was subsequently adhered to by the Soviet Union, was the first public announcement of the basic policy which the Allied nations proposed for the trial and punishment of Japanese war criminals. It took the form of a 'Proclamation Defining Terms for Japanese Surrender'.<sup>11</sup> The principal relevant provisions were:

- (4) The time has come for Japan to decide whether she will continue to be controlled by those self-willed militaristic advisers whose unintelligent calculations have brought the Empire of Japan to the threshold of annihilation, or whether she will follow the path of reason.
- (6) There must be eliminated for all time the authority and influence of those who have deceived and misled the people of Japan into embarking on world conquest, for we insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world.
- (8) The terms of the Cairo Declaration<sup>12</sup> shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine.
- (10) We do not intend that the Japanese shall be enslaved as a race or destroyed as a nation but stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners. The Japanese Government shall remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion, and of thought, as well as respect for the fundamental human rights shall be established.

The instrument by which Japan proclaimed its unconditional surrender to the Allied Powers was executed on 2

September 1945. It is reproduced as Appendix 1 to this chapter.<sup>13</sup> By the instrument, Japan accepted the provisions in the Potsdam Declaration and undertook 'to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the supreme commander for the Allied Powers ... for the purpose of giving effect to that declaration'.

The next most definitive step leading to the establishment of the Tokyo Tribunal was the decision at a meeting at Moscow on 26 December 1945 of the foreign Ministers of the United States, Great Britain and Russia, with the concurrence of China, to establish a Far Eastern Commission. The primary functions of the Commission were to formulate policies for the fulfilment by Japan of its obligations under the terms of surrender and to review, on the request of any member, any directive issued by the Supreme Commander Allied Powers involving policy decisions within the jurisdiction of the Commission.<sup>14</sup>

On 3 April 1946 the Commission issued a policy decision on the 'Apprehension, Trial and Punishment of War Criminals in the Far East'.<sup>15</sup> The most significant provision in the policy decision was that each nation represented on the Commission had the right to appoint a judge to 'the international courts' (emphasis added).

The basic pattern for the trials of Japanese war criminals was similar to the European trials of Axis war criminals. Major offenders were to be prosecuted by an international agency before an international court. All others were to be tried before national courts or commissions. The International Prosecution Section was established on 8 December 1945 to investigate and prosecute cases against the major war criminals. Joseph B. Keenan, formerly Assistant to the Attorney-General of the United States, had been appointed by President Truman on 30 November 1945 as Chief of Counsel for the prosecution of War Crimes Charges against the major leaders of Japan. He was appointed head of the International Prosecution Section. Since the directives of the Far Eastern Commission required that trials prosecuted by this agency be held before an international tribunal, the Supreme Commander issued on 19 January 1946 the special proclamation establishing the International Military Tribunal for the Far East (IMTFE).<sup>16</sup> (see *supra*)

## THE CHARTER OF THE TOKYO TRIBUNAL

The Charter of the IMTFE, established by the Proclamation of 19 January 1946, was amended and published in its amended form on 26 April 1946. It is reproduced in Appendix II to this chapter.

The London Agreement and Charter of 8 August 1945 were the basis adopted for the framing of the Charter of the Tokyo Tribunal, but some significant changes were made and require consideration.

First, in the description of Crimes against Peace, the word 'law' was inserted before the word 'treaties' appearing in Article 6 (a) of the Charter of the Nuremberg Tribunal. As a matter of drafting and construction, the insertion of the word 'law' was calculated to widen considerably the concept of Crimes against Peace. A war 'in violation of international law' potentially transcends a 'war in violation [only] of international treaties, agreements or assurances', because it brings into force all the principles and rules of international law irrespective of any consensual action by the country in whose interests the person charged had acted. The distinction is generally ignored by writers and commentators.

Second, the Tokyo Charter included in the jurisdiction of the Tribunal 'Conventional War Crimes: Namely, violations of the laws or customs of war'. It did not include the expansive description of 'war crimes' in Article 6 (b) of the Nuremberg Charter. However, there was no difference in substance between the respective provisions.

Third, in the definition of Crimes against Humanity, Article 6 (c) of the Tokyo Charter omitted the words 'or religious', which were included in the expression 'persecutions on political, racial or religious grounds' in Article 6 (c) of the Nuremberg Charter. Further, the Tokyo Charter did not include the words 'against any civilian population' which were part of such Article 6 (c).

Fourth, Article 6 of the Tokyo Charter was, as discussed in Chapter 12, more liberal and in favour of an accused person than the combined effect of Articles 7 and 8 of the Nuremberg Charter.

Fifth, Article 12 (d) of the Tokyo Charter expressly provided that the Tribunal shall 'determine the mental and physical capacity of any accused to proceed to trial'. At Nuremberg, the Tribunal assumed this power, as, for example, in the case of Rudolph Hess.

Sixth, it should be noted that the Tokyo Tribunal had jurisdiction only over persons who were charged with offences which included Crimes against Peace. If they were so charged, all of their offences were tried before the Tokyo Tribunal, but otherwise they were tried before a different Tribunal. As Horwitz points out,<sup>17</sup> 'the Nuremberg Tribunal, on the other hand, had no such exclusive provision, although actually all of the defendants were indicted for Crimes against Peace' (my emphasis, because in its Judgment the Nuremberg Tribunal did not assert that six of the accused remained indicted for Crimes against Peace.)

Seventh, provisions similar to Articles 9, 10 and 11 of the Nuremberg Charter relating to the criminal character of groups or organisations were not contained in the Tokyo Charter. The obvious reason was that in Japan there was no organised programming in support of aggressive war planning such as existed in Germany.

Eighth, the Charter of the Nuremberg Tribunal (Article 26) provided that its judgment as to the guilt or the innocence of any Defendant 'shall be final and not subject to review', although it contemplated the review of sentences. That prohibition was not contained in the Tokyo Charter. In fact, in some cases proceedings in error were instituted in the United States Supreme Court, but it declined jurisdiction.

In other respects, the provisions of the two Charters concerning the conduct of the trial, the admissibility of evidence and the course of the trial proceedings were substantially similar, although in the writer's view the drafting of the Tokyo Charter was more felicitous.<sup>18</sup>

## THE TOKYO TRIALS IN BRIEF RETROSPECT

It is the writer's view that the conception of the International Military Tribunal for the Far East had the basic flaw that it was wrongly assumed that a major trial of Japanese political and military leaders would in itself lead to world condemnation of the Japanese nation as a whole. That did not happen for many reasons, to which brief reference shall be made.

The proceedings were far too protracted. Despite the unconditional surrender of Japan on 2 September 1945, the trials did not begin until 29 April 1946. Final arguments were not concluded until 16 April 1948. The Tribunal occupied seven months in preparing its findings. It took more than a week to read the Judgment in open court. Despite the provision in Article 9 (a) of the Charter that 'the indictment shall consist of a plain, concise and adequate statement of each offense charged', the prolixity of the Tokyo indictment eclipsed that of the Nuremberg indictment. It began with a lengthy and inflammatory discourse in general terms, whereby all the accused were charged with conspiracy to wage aggressive war. There were fifty five counts, with the charge of conspiracy dominant. The facts traversed the internal and foreign policies of Japan during the period from 1 January 1928 to 2 September 1945. Twenty eight Japanese political and military leaders were joined in the indictment. There were eleven judges from separate countries, all of which had been involved in warfare with Japanese Forces. With few exceptions, the judges were not of outstanding stature. Discord among the judges was rampant, and there was strongly expressed dissent from the opinions of the majority. The principles established at Nuremberg were more than two years old before the Tokyo Judgment was concluded, and the new constitution of the Federal Republic of Germany (the Basic Law) was within a few months of being confirmed, ratified, signed and promulgated.

Against this background, the saving grace could only have been furnished by a judgment of outstanding quality, which regrettably was not forthcoming. In support of this contention it is necessary to refer to parts of the Judgment. After summarising the seven<sup>19</sup> substantial grounds of the defence challenge to the jurisdiction of the Tribunal, it stated:<sup>20</sup>

Since the law of the Charter is decisive and binding upon it this Tribunal is formally bound to reject

the first four of the above seven contentions advanced for the defence but in view of the great importance of the questions of law involved the Tribunal will record its opinion on these questions.

After this Tribunal had in May 1946 dismissed the defence motions and upheld the validity of its Charter and its jurisdiction thereunder, stating that the reason for this decision would be given later, the International Military Tribunal sitting at Nuremberg delivered its verdicts on the first of October 1946.

The Tokyo Tribunal then cited certain passages from the Judgment of the IMT (pp. 38-42 thereof) and stated:  
21

With the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord. They embody complete answers to the first four of the grounds urged by the defence as set forth above. In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.

It is proper to cite the following additional extracts from the Judgment of the Tribunal, as they deal, albeit briefly, with essential questions of law:

The fifth ground of the Defence challenge to the Tribunal's jurisdiction is that under the Instrument of Surrender and the Declaration of Potsdam the only crimes for which it was contemplated that proceedings would be taken, being the only war crimes recognised by international law at the date of the Declaration of Potsdam, are Conventional War Crimes as mentioned in Article 5 (b) of the Charter.

Aggressive war was a crime at international law long prior to the date of the Declaration of Potsdam, and there is no ground for the limited interpretation of the Charter which the defence seek to give it.

A special argument was advanced that in any event the Japanese Government, when they agreed to accept the terms of the Instrument of Surrender, did not in fact understand that those Japanese who were alleged to be responsible for the war would be prosecuted.

There is no basis in fact for this argument. It has been established to the satisfaction of the Tribunal that before the signature of the Instrument of Surrender the point in question had been considered by the Japanese Government and the then members of the Government, who advised the acceptance of the terms of the Instrument of Surrender, anticipated that those alleged to be responsible for the war would be put on trial.

...

The challenge to the jurisdiction of the Tribunal wholly fails.

## THE PLACE OF THE TOKYO TRIBUNAL IN INTERNATIONAL CRIMINAL LAW

As at Nuremberg, the Tokyo Tribunal was designated an 'International Military Tribunal' in Article 1 of the Charter. It is argued, however, that the Tokyo Tribunal was far more 'military' in its conception and performance than that at Nuremberg. Two of the judges held military rank and wore uniforms at the trial. General MacArthur approved the final list of the defendants to be charged. The members of the Tribunal were appointed by the Supreme Commander from the names submitted by the relevant nations. The Supreme Commander appointed the President. The whole fabric for the establishment of the Tribunal was of a military character in that it was based essentially on the Instrument of unconditional surrender, whereby Japan undertook, on behalf of the emperor, the



Japanese Government and their successors' to carry out the provisions of the Potsdam Declaration in good faith. The Instrument expressly recognised the omnipotent position of General MacArthur, as Supreme Commander Allied Powers (SCAP), in the effectuation of those provisions. General MacArthur took the initial steps by means of the special proclamation which he issued on 19 January 1946, concurrently with the promulgation of the Tokyo Charter. Those steps were the actions of a supreme military commander.

In my view, there are significant differences in emphasis between the two Charters in relation to the execution of the Judgments of the respective Tribunals. In the case of Nuremberg, ultimate authority was vested in the Control Council for Germany (Article 29). The Tokyo Charter provided (Article 17):

... The record of the trial will be transmitted to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity. (emphasis added).

Nevertheless the character of the Tokyo Tribunal was different to that of a traditional military court or commission. By reason of the definition of Crimes against Peace (paragraph (a) of Article 5), its jurisdiction extended to determining, where relevant, whether or not a war was 'in violation of international law'.

It is therefore submitted that the Tokyo Tribunal should be regarded as sui generis, with the consequence that the binding or persuasive force of its Judgment should not be exalted in the sphere of international criminal law. The Nuremberg Charter was described by the IMT as 'itself a contribution to international law'.<sup>22</sup> The same could not be said of the Tokyo Tribunal, which, despite the authority and influence of the Far Eastern Commission, was not the product of the same nature and degree of political impetus which led to the London Agreement and Charter of 8 August 1945.

Despite the protestations to the contrary of the President of the Tokyo Tribunal, Sir William Webb, the fact is that the Tribunal did follow the substantive decisions of the Nuremberg Tribunal to a large degree, as illustrated by the extract from its Judgment cited previously in this chapter.

The question of reliance on Nuremberg precedents arose acutely during the Tokyo trial. On 10 July 1946, the President saw fit to deny that the Tribunal had 'followed Nuremberg slavishly' (emphasis added). As the extract from the transcript cited in the footnote shows, it had not been suggested that Nuremberg precedents had been followed slavishly.<sup>23</sup>

In his preface to the monograph of Solis Horwitz, (*op. cit.*), a member of the prosecution team at Tokyo, to which reference has been made in footnotes 16 and 17 to this chapter, Brigadier General Telford Taylor wrote in November 1950:

This valuable descriptive analysis of the Tokyo Trial should command the attention, not only of students of the War and of contemporary Japan, but of all international lawyers. For it is as a milestone in the development and application of international law that the war crimes trials will find their niche in the history of modern times.

As the scene of the first great international trial, where many basic principles of the ius gentium received their first judicial formulation, Nuremberg has become a synonym for war crimes trials and has received the lion's share of attention from both journalists and jurists. Unhappily, public indifference to the Tokyo Trial has been matched by an apparent lack of interest on the part of the sponsoring governments themselves. Up to now, for example, our own government has not undertaken to publish even the Tokyo Judgment, to say nothing of the testimony and other proceedings before the Tribunal.<sup>24</sup>

It is appropriate in the context of this part of this chapter to reproduce in Appendix III the text of the Conclusion

in the monograph of Horwitz (*op. cit.*), bearing in mind that he was an eyewitness.

## AUSTRALIAN PERCEPTIONS RELATING TO THE TREATMENT OF JAPANESE WAR CRIMINALS

The dearth of contributions to the literature relating to war crimes trials generally, and the Tokyo Tribunal in particular, by Australian jurists, academics, practising lawyers and historians is remarkable.

In my view the most outspoken Australian jurist was, and remains, the late Sir John Barry, a judge of the Supreme Court of Victoria from 1947 until his death in 1969. His forthright views on war crimes were graphically described by Sir Zelman Cowen in the following terms:<sup>25</sup>

In [1943], in two articles in the Australian Law Journal,<sup>26</sup> he [Sir John Barry] discussed the trial and punishment of Axis war criminals and the Moscow Declaration on War Crimes. He strongly advocated the taking of steps in advance of the termination of hostilities to establish an effective body 'which would have power to ensure that those rules of international law which are designed to maintain standards of human decency shall be more than mere pious aspirations. Only in that way can those rules take on the reality which they now lack because there is no effective sanction for their breach.' He argued for the constitution of an international criminal court to try war criminals; despite the difficulties in such an undertaking, 'the influence it would have upon the maintenance of civilized standards would be so immense that these difficulties must be resolved.'

...

At a later time he expressed serious doubts about the Nuremberg tribunal and judgment, and he was very critical of the proceedings which led to the conviction and execution of the Japanese General Yamashita:

The ad hoc tribunals which were used for the conduct of the trial of some war criminals drawn from the vanquished nations -- he wrote -- were fundamentally political and it is this circumstance which troubles a great many lawyers, who, while holding the conduct of those criminals in deepest abhorrence and recognising that punishment was deserved, were nevertheless, in the years of retribution after the war, very uneasy about the proceedings of some tribunals and have grown no happier about them now that the passing of the years has given opportunity for cogitation and calmer reflection.

His criticisms were the familiar ones: retrospective laws, violation of the maxim nulla poena and dressed up retribution meted out by victor to vanquished. There are, to be sure, many disturbing aspects of the war crimes trials and judgments -- though it is not altogether fair to lump the Yamashita and the Nuremberg proceedings together -- but I cannot think -- as Barry's earlier writings suggested -- that the decision to proceed in this way was altogether ignoble and unwise. The problems to which he adverted a decade after the events, were apparent to a clear minded lawyer in 1943, and Barry was not one to be caught up in the passions of war. It is true that in 1943 he argued for the constitution of an international criminal tribunal but I am sorry that he did not link up his pre and post-war writings on these matters, and spell out more fully and precisely what he regarded, on reflection, as the appropriate course to pursue.

## AUSTRALIAN GOVERNMENT POLICIES AND ACTIONS

The Australian Government pursued an active program in relation to warcrimes trials and legislation to

provide what it perceived as an appropriate basis.

In September 1945 the Commonwealth Government released a summary of the facts and findings of Sir William Webb's initial report, which had been tendered to the Government on 21 March 1944. At that time Dr. H.V. Evatt, Minister for External Affairs, issued a statement, simultaneously released in London and Canberra, in which he declared:<sup>27</sup>

While this report relates only to part of the whole field of Japanese terrorism and criminality, its contents are such as to shock and dismay the feelings of every decent human being. It reveals not only individual and isolated acts of barbarity but also practices which are beyond the pale of accepted human conduct which could not have become general without the connivance, encouragement and direction of superior officers up to the highest. If those responsible for these outrages are allowed to escape punishment it will be the grossest defeat of justice and a travesty of principles for which the war has been fought.

In its demand that all Japanese war criminals be brought to trial, the Australian Government is actuated by no spirit of revenge but by profound feelings of justice and of responsibility to ensure that the next generation of Australians is spared the frightful experiences of the kind which Sir William Webb's report reveals.

I emphasize most of all that the war crimes committed by Japanese forces in the field, while utterly wicked on the part of the actual perpetrators, are also part of a system of terrorism in which all Japanese troops and commanders participated. It is our duty to see that those who organized the system are punished and that the system itself is completely eradicated. Those at the top are, in our view, at least equally guilty with the actual perpetrators on the spot.

Last week the United States Government released for publication reports of atrocities committed by the Japanese against American nationals. These reports strengthened the confirmed policy of the Australian Government, based on its own judicial findings, that there should be no immunity from trial for war crimes for any Japanese whatsoever. Furthermore it is the view of the Australian Government that the general charge of planning and waging aggressive warfare which will shortly be preferred against the major German war criminals applies equally to those in Japan who are ultimately responsible for the acts detailed in Sir William Webb's report.

In common with the other United Nations Governments represented on the War Crimes Commission, the Australian Government has recently received from the Commission a series of recommendations for the apprehension and trial of suspected Japanese, which, if they are carried out, will ensure the punishment of all culpable persons in the Japanese administration and armed forces.

The Australian Government is indicating to the War Crimes Commission not only its entire endorsement of the procedures recommended but also its firm view that the process should be put into operation without delay. These recommendations, which if properly applied will ensure that no Japanese who deserves punishment shall escape, owe much to the work of Lord Wright, who is the representative of Australia on the War Crimes Commission as well as Chairman of the Commission.

## The War Crimes Act 1945

The War Crimes Act was passed by the Commonwealth Parliament in October 1945 with bipartisan support. Its provisions were analysed by Mr. B.J. Dunn, barrister, in an article in (1945-46) 19 A.L.J., pp. 359-361. The basic purpose of the statute was to provide the legislative authority for the trial of war criminals by Australian military courts. Mr. Dunn compared the provisions of the 1945 Act with those of the British Royal Warrant and the Order dated 24 September 1945 entitled 'Regulations Governing the Trial of War Criminals' issued by General MacArthur as Commander-in-Chief of the United States Army Forces in the Pacific Area. Although he noted substantial similarity between all three provisions in relation to the acts or omissions which were defined as 'war crimes', Mr. Dunn observed: <sup>28</sup>

Since all war criminals to be tried are subjects of or adherents to a common enemy it is to be regretted that the United Nations did not agree on a uniform definition of the war crimes which may be tried and punished.

(Amendments to the 1945 Act, introduced on 28 October 1987, will be discussed separately in Appendix IV to this Chapter).

### Other post-war legislation

The Commonwealth Government, in common with other governments of the United Nations, had approved the Charter of the United Nations which was signed at San Francisco on 26 June 1945. Thereafter the Australian Parliament enacted legislation much of which emanated from Declarations made by the United Nations Organisation. Such statutes included the Genocide Convention Act 1949 and the Geneva Conventions Act 1957.

The most significant features of Australian Government policies, both before and after the establishment of the Tokyo Tribunal, were their consistency and political bipartisanship. For many decades there has been little interest in Australia in the Tokyo Tribunal's activities or the fate of those who were tried. The crimes committed by Japanese between 1939 and 1945 are fast fading into history, to be replaced by a capitalistic concentration on the economic strength of Japan and desultory debate on the future political and strategic relationships between Australia and Japan.

### CRITICISM OF THE TOKYO TRIAL

It is not proposed in this study to consider the wide-ranging literature concerning the Tokyo Tribunal, which, as in the case of Nuremberg, evoked at the time marked differences of opinion concerning the law of the Charter and the validity of the majority Judgment of the Tribunal. However, in the concluding section of this chapter some brief consideration will be given to the proceedings of the International Symposium on the Tokyo War Crimes Trial, held in Tokyo in May 1983. The symposium was an international gathering of scholars, critics and writers with a special interest in the trial. Among those who presented papers was Dr. B.V.A. Roling, the Dutch judge of the Tokyo Tribunal.

In a review of the proceedings of the symposium, Professor James Crawford, of Sydney University, stated: <sup>29</sup>

On the whole it [the account of the symposium proceedings] reflects badly on the justice and legality of the trials. The Nuremberg trials, which have been studied in much greater depth, are generally accounted just, whether or not legal. The examination of the procedural fairness of the Tokyo trials is advanced here especially by Roling (... who dissented in important respects from its findings) and by Pritchard. The examination of their legality, on the other hand, is obscured by an uncritical statement of 'the Soviet position' by Lounev, and a constricted analysis of the possible legal underpinnings by Ipsen of the Federal Republic of Germany. Among the Japanese participants (many of them historians rather than lawyers) there is a wide diversity of views and much interesting debate, although the historian, Kojima, for example, appears to ignore the possibility that an understanding of the historical background to and processes of Japanese military involvement in Asia and then in the World War might nonetheless allow a proper judgment of the conduct of individuals.

Not all the criticisms from Japanese speakers of the trials are convincing: for example, Tsurumi's arguments from the failure of the trial to implant itself on Japanese popular consciousness contain a spectacular series of *non sequiturs*. But the intensity and openness of the debate is impressive: most impressive is the concluding session, with its contrast, indeed duality, between the United States scholar Millier's insistence on procedural and other defects in the trial, and the Japanese scholar

Ienaga's insistence that these defects should not conceal the profounder, and none-the-less valid, judgment entailed by the verdicts, if not the sentences.

The views expressed in his paper by Professor Ipsen, president of Ruhr University at Bochum, West Germany, are of interest because of some seeming paradoxes. He stated those views in summary form thus:<sup>30</sup>

The jurisdiction of the IMT for crimes against peace was not based on international law in force at that time. Individual responsibility had not been established for the prohibition against resort to war already in existence. Nor were there sanctions in criminal law against a breach of that prohibition. To that extent, the charter contained ex post facto legislation and was incompatible with the maxim nullum crimen sine lege, which the Tokyo tribunal itself recognised expressly as a 'general principle of justice'.

2. There remain legal doubts with regard to the jurisdiction of the IMT for war crimes, because for such crimes, which unquestionably could be tried and punished, the jurisdiction of courts-martial of the detaining and occupying powers was established by the Geneva Convention of 1929 and by customary law. It must be admitted, however, that a fair trial before a court-martial would have led to similar punishments.

3. The jurisdiction of the IMT for crimes against humanity ... was based on international law in force at that time. Article 43 of the Hague Regulations empowered the occupying power to establish an international tribunal, and this tribunal could apply law derived from a recognized source of international law, that is to say, the condemnation of murder and other inhumane acts as a general principle of law recognized by civilized nations.

Professor Ipsen stated his conclusions on the influence of the Tokyo trial on the development of international law in these terms:<sup>31</sup>

In the light of developments and state practice since Nuremberg and Tokyo, we must conclude unhappily that the law of both charters has been neither reaffirmed by treaty law nor developed into customary law. The main problems still to be resolved are the following:

1. The problem of national or international jurisdiction has remained controversial among the states of the world.
2. The majority of states is still not prepared to accept individual responsibility for crimes in international law.
3. In order to meet the requirements of the general principle nullum crimen sine lege, the provisions of international criminal law and international procedural law have to be formulated as precisely and definitely as the provisions of national criminal law. In particular, international criminal law must provide exact definitions of justifications and exculpations, such as superior orders and other defenses, which were controversial at the Nuremberg and Tokyo trials.
4. The provisions of international criminal law must include exact descriptions of penalties, that is, of the type of penalty and, in case of imprisonment, the duration of the penalty.
5. Conflicts between national criminal law and international criminal law must be resolved.

The basic theme of the paper delivered by Onuma, Associate Professor of International Law, Tokyo University, was refreshingly pragmatic. It is true that he criticised the Tokyo trial as unfair because no issue could be raised concerning the actions of the Allied Powers, including the atomic bombing of Hiroshima and Nagasaki, and the violation by the Soviet Union of the neutrality pact of 13 April 1941 between Japan and Russia.

However, Onuma said:

I believe that we should acknowledge frankly that the legal basis for the Tokyo and Nuremberg trials cannot be found in international law as it existed at the time. However, seen from a broader perspective, that admission is not necessarily damaging to the assessment that the trials were legal and legitimate. The problem of crimes against peace is a good example. I pointed out earlier that one of its two constituent elements, the concept of the illegality of war, had received general recognition in international society and had already been established in international law by the time of the outbreak of World War II. ... In regard to crimes against humanity, traditional international law simply did not foresee that the leaders of a state might use the state apparatus in the systematic slaughter of an enormous number of the country's own citizens -- but this is precisely what the Nazis did. These acts were in fact committed. Traditional international law was deficient in this respect and that deficiency had to be corrected.<sup>32</sup>

Professor Onuma's views, as cited, will be developed and expanded in the writer's ultimate thesis.

Japan's pre-war political process, which loomed large in the Tokyo indictment and Judgment, was the theme of three of the papers. I concur in the following view expressed by Kojima, historian and critic:

At the Tokyo trial, Japanese leaders were charged with a 'conspiracy' to launch and wage an aggressive war. However, I think it is clear ... that the elements of confusion, of tangled complexity, in Japanese policy-making at this time made any unified conspiracy quite impossible. In this sense the situation in Japan was very different from that in Nazi Germany, where a single dictator and the group surrounding him were in constant control of policy decisions.

The prosecution at the trial also spoke of a military dictatorship, but in fact the army and the navy acted as quite independent entities in advocating policy. The result was a series of ad hoc measures designed to treat the symptoms of a steadily deteriorating situation. Precisely because the Japanese government was ultimately incapable of the kind of 'conspiracy' that would have enabled it to formulate national policies based on a wide perspective, it was forced in its progress thereafter from Manchuria into China proper to rely on policies that were narrow, short-sighted and unilateral. When we look back on Japan's past, it is this aspect that most invites reflection.<sup>33</sup>

Dr. R.J. Pritchard,<sup>34</sup> in an overview of the historical importance of the Tokyo trial, made the following observation which, in my opinion, is a valid commentary on the Tokyo Tribunal:

Like its Nuremberg counterpart -- and every other international war crimes proceedings -- the Tokyo war trial was a product of the highly-charged emotional atmosphere of its time. It is axiomatic that 'international' criminal prosecutions are broadly political as well as juristic causes. Few of the defendants at the Tokyo trial could have expected fairness, tact or understanding, once they had comprehended the indictment. (emphasis added)<sup>35</sup>

In my view the most lucid and impressive of the papers delivered was that of former Judge Roling, especially as it was prepared against the background of his membership of the Tokyo Tribunal as the representative of the Netherlands. Dr. Roling (at the time Professor Emeritus, international law, University of Groningen) strongly asserted that international law before World War II did not make aggressive war a crime. He said:

My personal conviction was that the victors had no authority to create new criminal laws and punish the vanquished on the basis of those new laws. Moreover, to claim this licence would create a hazardous precedent and later provide an opportunity, after a successful war, to eliminate hated opponents as war criminals.<sup>36</sup>

Nevertheless, Dr. Roling recognised the reality of the situation at the time of the unconditional surrender of

Japan. He stated:

Political measures were needed to protect the fragile peace against potential leaders who might provide a nucleus for groups bent on revenge. There was also a growing aversion to war which was fueled by the war crimes and atrocities committed by both sides. The form of a criminal trial might contribute to the progressive development of international law in such a way that it would no longer recognize the freedom of a state to wage war, but would completely reject it and would regard aggressors as criminals and outlaws.<sup>37</sup>

Dr. Roling also conceded that since the precedent had been set in the Nuremberg Charter, it was 'hardly possible' to avoid prosecuting Japanese leaders for crimes against peace.<sup>38</sup> His conclusion was that at the time of the Tokyo trial 'international law was en route to banning war and rendering it a criminal offence. The crime against peace was in statu nascendi, so to speak.'<sup>39</sup>

## NOTES

1. The establishment of the Australian war crimes courts was trenchantly criticised by Mr. G. Dickinson, a Sydney lawyer, who, as a Lieutenant-Colonel in the Royal Australian Armoured Corps, was Advisory Officer to the Japanese defence team at Manus Island, New Guinea. Source: Australian Quarterly, June 1952, vol. 24, pp. 69-75. Lieutenant-Colonel Dickinson described the jurisdiction conferred by statute on the courts as 'a new and irresponsible element in the field of Public International Law following the Potsdam Agreement'. He said:

The length of time spent in listening to cases that never should have been brought to trial and in listening to irrelevant evidence amounted in the case of the Australian War Crimes Courts, to some years.

...

Perhaps the worst feature of the Australian War Crimes Courts was the highly coloured and exaggerated statements published in the Australian Press. The contents of the prosecution's typed opening address, radioed to Australia, became front page news before the trial commenced. In some cases no evidence was given in court to support the statement. ... To my mind the only satisfactory War Crimes Court would be one conducted by a neutral. It might be accessible to both victor and vanquished alike, and such a court would avoid the character of a 'revenge party'.

See also Piccigallo, The Japanese on Trial, University of Texas Press, 1979, pp. 121-139, in which the author discusses the deficiencies from a juridical viewpoint, mainly procedural, of the Australian war crimes trials.

Statistics of the Australian trials, conducted at eight centres, from Hong Kong to Darwin, are given by Piccigallo (op. cit., p. 139) and by Tutorow, op. cit., Introduction, p. 7.

2. See Lawrence Taylor, A Trial of Generals, Icarus Press, Indiana, 1981, especially Chapters 8 and 9. The basis of the verdict of guilty in each of the cases of Yamashita and Homma was that they failed to provide effective control of their troops as was required by the circumstances. Neither case should be regarded as illuminating any aspect of public international law.
3. The Board was generally, but not formally, known as the Australian War Crimes Commission: see Department of External Affairs, Current Notes on International Affairs, 1945, p. 219.
4. Australian War Crimes Board of Inquiry, Report, vol. 1, House of Representatives Record 5624 (Part 1), presented 10 April 1946, pp. 10-11.
5. Ibid., pp. 8-9.
6. E.P.I.L., vol. 4, p. 244.
7. The Tokyo War Crimes Trial, Pritchard and Zaide (eds.), 22 vols., (1981), Garland Publishing Inc., New York and London, vol. 1, pp. xiv-xvi and footnotes 73 and 74 to the Historical Introduction (hereinafter cited as The Tokyo War Crimes Trial, followed by the number of the relevant volume).
8. The Tokyo War Crimes Trial, vol. 1, first two pages (not numbered) of the section containing 'Pre-Trial Documents'.
9. See Bassiouni, International Crimes: Digest/Index, vol. 1, pp. 231-232.
10. U.S. Congressional Record (daily), vol. 91, No. 156 (Sept. 6, 1945), p. 8488, reproduced in (1945) 39 A.J.I.L., Supp., pp. 264-265.
11. U.S. Department of State Bulletin, vol. xiii, No. 318, 29 July, 1945, pp. 137-138.



12. The Cairo Declaration was signed on 1 December 1943 by China, the United Kingdom and the United States. Although it set forth that the signatories 'are fighting this war to restrain and punish the aggression of Japan', the Declaration was directed essentially to territorial issues and did not deal with any policy matters relating to Japanese war criminals. (U.S. Department of State Bulletin, 1943, p. 394).
13. Congressional Record (daily), vol. 91, No. 156, 6 September 1945, p. 8488.
14. U.S. Department of State Bulletin, vol. xiii, No. 340, pp. 1027-1032
15. Activities of the Far Eastern Commission, Report by the Secretary General, U.S. Department of State Publication, 2888, Far Eastern Series 24, 1947, p.2.
16. The summary of the events described in this paragraph has been adopted from the contribution by S. Horwitz published by the Carnegie Endowment for International Peace in International Conciliation, November 1950, No.465.
17. Horwitz, op. cit., p. 487.
18. For a more detailed comparison of procedural differences, see Horwitz, op. cit., pp. 486-488.
19. See p. 48,436 of the proceedings. The references in this chapter to pages of the proceedings are derived from the relevant volumes of The Tokyo War Crimes Trial, edited by Pritchard and Zaide, (op.cit.). The seven grounds were:
  - (1) The Allied Powers acting through the Supreme Commander have no authority to include in the Charter of the Tribunal and to designate as justiciable 'Crimes against Peace' (Article 5 (a));
  - (2) Aggressive war is not per se illegal and the Pact of Paris of 1928 renouncing war as an instrument of national policy does not enlarge the meaning of war crimes nor constitute war a crime;
  - (3) War is the act of a nation for which there is no individual responsibility under international law;
  - (4) The provisions of the Charter are 'ex post facto' legislation and therefore illegal;
  - (5) The Instrument of Surrender which provides that the Declaration of Potsdam will be given effect imposes the condition that Conventional War Crimes as recognised by international law at the date of the Declaration ... would be the only Crimes prosecuted;
  - (6) Killings in the course of belligerent operations in so far as they constitute violations of the rules of war or the laws and customs of war are the normal incidents of war and are not murder;
  - (7) Several of the accused being prisoners of war are triable by court martial as provided by the Geneva Convention 1929 and not by this tribunal.
20. Page 48,437 of the proceedings.
21. Pages 48,437-48,442 of the proceedings.
22. I.M.T. Judgment, p. 38.
23. Proceedings, 10 July, 1946, pp. 2,225-2,226.

Mr. William Logan, American Defense Counsel: 'If the Tribunal please, I wish to present a matter ... on behalf of all the accused ... This Tribunal has on several occasions based its rulings on precedents which have been established at the Nuremberg Trials and I wish to call your attention to a ruling which

was made at the Nuremberg Trial with respect to the admission of interrogatories of the accused.'

The President (Sir William Webb): 'You are wrong in assuming we have been following Nuremberg slavishly. I have not read the decisions until the last day or two; we are always pleased to have their guidance and I think in some matters we have followed them. I do not remember any matter in which we have given a different ruling.'

Mr. Logan: 'I think it has been mentioned several times as to the rulings that have been made at Nuremberg and they have been followed here.'

President: 'I will tell you one matter. Lord Patrick has reminded me several times that we are far more liberal to the defense than they are at Nuremberg.'

Mr. Logan: 'May I continue, if the Tribunal please? I think you will follow what I have ...'

President: 'We are not going to have any general discussion on Nuremberg rulings. If you are going to point out a ruling at Nuremberg which we have not followed, you had better wait until the point arises again. I am certainly not going back on any decision of mine because it may have been something different than given at Nuremberg. We are not slavishly following Nuremberg, which I do not think we should do.'

24. So far as the writer is aware, it was not until 1981 that Garland Publishing Inc., New York, published The Tokyo War Crimes Trial, in twenty two volumes with five guide and index volumes. The series was annotated, compiled and edited by R. John Pritchard and Sonia Magbanua Zaide; the Project Director was Professor D.C. Watt, of the London School of Economics. The series contains a reproduction of the total transcript of the official proceedings of the trial.
25. The 1970 Turner Memorial Lecture, entitled 'J.V. Barry : A Memoir', delivered at Hobart, Tasmania.
26. (1943-44) 17 A.L.J., pp. 43-49; (1943-44) 17 A.L.J., pp 248-250.
27. Australian Department of External Affairs, War Crimes, Current Notes on International Affairs, 1945, p. 220.
28. (1945-46) 19 A.L.J., p. 360. See also article by Ian Spain in (1946-47) 20 A.L.J., pp. 171-173.
29. The Tokyo War Crimes Trial. An International Symposium, Edited by C. Hosoya, N. Ando, Y. Onuma, and R. Minear, p.1
30. Ibid., p. 43.
31. Ibid., p. 44.
32. Ibid., pp. 48-49.
33. Ibid., p. 76.
34. Dr. Pritchard was Research Associate and joint compiler of The Tokyo War Crimes Trial, op. cit., London School of Political Science and Economics.
35. The Tokyo War Crimes Trial. An International Symposium, p. 89.
36. Ibid., p. 128.
37. Ibid., p. 130.

38. Ibid., p. 128.
39. Ibid., p. 130.

## APPENDIX I

## SURRENDER OF JAPAN

UNITED STATES - CHINA - GREAT BRITAIN - SOVIET UNION

## UNCONDITIONAL SURRENDER OF JAPAN

September 1, 1945.

1. We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government, and the Japanese Imperial General Headquarters, hereby accept the provisions in the declaration issued by the heads of the Governments of the United States, China, and Great Britain on July 26, 1945, at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four Powers are hereafter referred to as the Allied Powers.
2. We hereby proclaim the unconditional surrender to the Allied Powers of the Japanese Imperial General Headquarters and of all Japanese armed forces and armed forces under Japanese control wherever situated.
3. We hereby command all Japanese forces, wherever situated, and the Japanese people, to cease hostilities forthwith, to preserve and save from damage all ships, aircraft, and military and civil property, and to comply with all requirements which may be imposed by the supreme commander for the Allied Powers or by agencies of the Japanese Government at his direction.
4. We hereby command the Japanese Imperial General Headquarters to issue at once orders to the commanders of all Japanese forces and all forces under Japanese control, wherever situated, to surrender unconditionally themselves and all forces under their control.
5. We hereby command all civil, military, and naval officials to obey and enforce all proclamations, orders, and directives deemed by the supreme commander for the Allied Powers to be proper to effectuate this surrender and issued by him or under his authority, and we direct all such officials to remain at their posts and to continue to perform their noncombat duties unless specifically relieved by him or under his authority.
6. We hereby undertake for the emperor, the Japanese Government, and their successors to carry out the provisions of the Potsdam declaration in good faith, and to issue whatever orders and take whatever action may be required by the supreme commander for the Allied Powers or any other designated representative of the Allied Powers for the purpose of giving effect to that declaration.
7. We hereby command the Japanese Government and the Japanese Imperial General Headquarters at once to liberate all Allied prisoners of war and civilian internees under Japanese control and to provide for their protection, care, maintenance, and immediate transportation to places as directed.
8. The authority of the Emperor and the Japanese Government to rule the state shall be subject to the supreme commander for the Allied Powers, who will take such steps as he deems proper to effectuate these terms of surrender.

Source: See footnote 13 of this Chapter.

APPENDIX II  
CHARTER OF THE INTERNATIONAL MILITARY  
TRIBUNAL FOR THE FAR EAST

I.

CONSTITUTION OF TRIBUNAL

Article 1. Tribunal Established. The International Military Tribunal for the Far East is hereby established for the just and prompt trial and punishment of the major war criminals in the Far East. The permanent seat of the Tribunal is in Tokyo.

Article 2. Members. The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.

Article 3. Officers and Secretariat.

- (a) President. The Supreme Commander for the Allied Powers shall appoint a Member to be President of the Tribunal.
- (b) Secretariat.
- (1) The Secretariat of the Tribunal shall be composed of a General Secretary to be appointed by the Supreme Commander for the Allied Powers and such assistant secretaries, clerks, interpreters, and other personnel as may be necessary.
- (2) The General Secretary shall organize and direct the work of the Secretariat.
- (3) The Secretariat shall receive all documents addressed to the Tribunal, maintain the records of the Tribunal, provide necessary clerical services to the Tribunal and its Members and perform such other duties as may be designated by the Tribunal.

Article 4. Convening and Quorum, Voting and Absence.

- (a) Convening and Quorum. When as many as six members of the the Tribunal are present, they may convene the Tribunal in formal session. The presence of a majority of all members shall be necessary to constitute a quorum.
- (b) Voting. All decisions and judgments of this Tribunal, including convictions and sentences, shall be by a majority vote of those Members of the Tribunal present. In case the votes are evenly divided, the vote of the President shall be decisive.
- (c) Absence. If a member at any time is absent and afterwards is able to be present, he shall take part in all subsequent proceedings; unless he declares in open court that he is disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.

## II.

## JURISDICTION AND GENERAL PROVISIONS

Article 5. Jurisdiction Over Persons and Offenses. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) Crimes against Peace: Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- (b) Conventional War Crimes: Namely, violations of the laws or customs of war;
- (c) Crimes against Humanity: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.

Article 6. Responsibility of Accused. Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

Article 7. Rules of Procedure. The Tribunal may draft and amend rules of procedure consistent with the fundamental provisions of this Charter.

Article 8. Counsel.

- (a) Chief of Counsel. The Chief of Counsel designated by the Supreme Commander for the Allied Powers is responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of this Tribunal, and will render such legal assistance to the Supreme Commander as is appropriate.
- (b) Associate Counsel. Any United Nation with which Japan has been at war may appoint an Associate Counsel to assist the Chief of Counsel.

## III.

## FAIR TRIAL FOR ACCUSED

Article 9. Procedure for Fair Trial. In order to insure fair trial for the accused the following procedure shall be followed:

- (a) **Indictment.** The indictment shall consist of a plain, concise, and adequate statement of each offense charged. Each accused shall be furnished, in adequate time for defense, a copy of the indictment including any amendment, and of this Charter, in a language understood by the accused.
- (b) **Language.** The trial and related proceedings shall be conducted in English and in the language of the accused. Translations of documents and other papers shall be provided as needed and requested.
- (c) **Counsel for Accused.** Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.
- (d) **Evidence for Defense.** An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine.
- (e) **Production of Evidence for the Defense.** An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document and the relevancy of such facts to the defense. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require.

Article 10. Applications and Motions before Trial. All motions, applications, or other requests addressed to the Tribunal prior to the commencement of trial shall be made in writing and filed with the General Secretary of the Tribunal for action by the Tribunal.

## IV.

## POWERS OF TRIBUNAL AND CONDUCT OF TRIAL

Article 11. Powers. The Tribunal shall have the power

- (a) To summon witnesses to the trial, to require them to attend and testify, and to question them,
- (b) To interrogate each accused and to permit comment on his refusal to answer any question,
- (c) To require the production of documents and other evidentiary material,
- (d) To require of each witness an oath, affirmation, or such declaration as is customary of the witness, and to administer oaths,
- (e) To appoint officers for the carrying out of any task designated by the Tribunal, including the power to have evidence taken on commission.

Article 12. Conduct of Trial. The Tribunal shall

- (a) Confine the trial strictly to an expeditious hearing of the issues raised by the charges,
- (b) Take strict measures to prevent any action which would cause any unreasonable delay and rule out irrelevant issues and statements of any kind whatsoever,
- (c) Provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges,
- (d) Determine the mental and physical capacity of any accused to proceed to trial.

Article 13. Evidence.

- (a) Admissibility. The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value. All purported admissions or statements of the accused are admissible.
- (b) Relevance. The Tribunal may require to be informed of the nature of any evidence before it is offered in order to rule upon the relevance.
- (c) Specific evidence admissible. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:
  - (1) A document, regardless of its security classification and without proof of its issuance or signature, which appears to the Tribunal to have been signed or issued by any officer, department, agency or member of the armed forces of any government.
  - (2) A report which appears to the Tribunal to have been signed or issued by the International Red Cross or a member thereof, or by a doctor of medicine or any medical service personnel, or by an investigator or intelligence officer, or by any other person who appears to the Tribunal to have personal knowledge of the matters contained in the report.
  - (3) An affidavit, deposition or other signed statement.
  - (4) A diary, letter or other document, including sworn or unsworn statements which appear to the Tribunal to



contain information relating to the charge.

- (5) A copy of a document or other secondary evidence of its contents, if the original is not immediately available.
- (d) Judicial Notice. The Tribunal shall neither require proof of facts, of common knowledge, nor of the authenticity of official government documents and reports of any nation nor of the proceedings, records, and findings of military or other agencies of any of the United Nations.
- (e) Records, Exhibits and Documents. The transcript of the proceedings, and exhibits and documents submitted to the Tribunal, will be filed with the General Secretary of the Tribunal and will constitute part of the Record.

Article 14. Place of Trial. The first trial will be held at Tokyo and any subsequent trials will be held at such places as the Tribunal decides.

Article 15. Course of Trial Proceedings. The proceedings at the Trial will take the following course:

- (a) The indictment will be read in court unless the reading is waived by all accused.
- (b) The Tribunal will ask each accused whether he pleads "guilty" or "not guilty".
- (c) The prosecution and each accused (by counsel only, if represented) may make a concise opening statement.
- (d) The prosecution and defense may offer evidence and the admissibility of the same shall be determined by the Tribunal.
- (e) The prosecution and each accused (by counsel only, if represented) may examine each witness and each accused who gives testimony.
- (f) Accused (by counsel only, if represented) may address the Tribunal.
- (g) The prosecution may address the Tribunal.
- (h) The Tribunal will deliver judgment and pronounce sentence.

## V.

## JUDGMENT AND SENTENCE

Article 16. Penalty. The Tribunal shall have the power to impose upon an accused, on conviction, death or such other punishment as shall be determined by it to be just.

Article 17. Judgment and Review. The judgment will be announced in open court and will give the reasons on which it is based. The record of the trial will be transmitted directly to the Supreme Commander for the Allied Powers for his action thereon. A sentence will be carried out in accordance with the order of the Supreme Commander for the Allied Powers, who may at any time reduce or otherwise alter the sentence except to increase its severity.

By command of General MacArthur:

Richard J. Marshall  
Major General, General Staff  
Corps, Chief of Staff.

Official: B.M. Fitch Brigadier General, AGD, Adjutant General.

Source: Supreme Commander, General Headquarters, APO 500, 26 April 1946 General Orders No. 20.

## APPENDIX III

## THE CONCLUSION TO THE MONOGRAPH OF S. HORWITZ \*

Since the author's task has been to trace the course and to delineate the issues of the Tokyo trial, he has refrained to the best of his ability from evaluation of the trial and the judgment. This does not mean, however, that he is without conviction on the fundamental issues or the merits of the trial. As one who participated as a member of the prosecution staff from beginning to end and who bears some responsibility for the outcome of the trial, he has deep and positive convictions as to its value. It may therefore not be entirely unwarranted for the author to state here at the end of this report what he considers the most important contribution of the Tokyo trial.

The Tokyo judgment was not the product of the first flush of victory. More than three years had elapsed since active hostilities in the most devastating war in world history had ended. Already the psychological factors, which enable man to go forward even after the most harrowing experience, had begun to operate and to bring a measure of forgetting of the death and mutilation and destruction and chaos which had followed in the wake of the war. Already the Grand Alliance, which had brought the war to a successful conclusion and had dedicated itself to the eradication of war as the accumulation of all evil, had broken apart. New conflicts and new problems had arisen, and new alignments had been formed among the victors.

It was therefore not surprising that in the darkening shadows of current events there were added to the voices of those who did not believe in the principles of the trial and who could see no illegality in war regardless of its aggressive character, the warnings of those who saw in the principles of Nuremberg and Tokyo a dangerous precedent which could be applied to our own leaders regardless of blame or guilt in the event we should lose a war. It was not surprising that it should be forgotten that the aggressor knows neither law nor principle and that his actions toward a defeated non-aggressor are determined solely by considerations of expediency for the promotion of his own aggressive design. Nor was it altogether unexpected that these new voices should fail to comprehend that the assumptions of their argument negated the very base of all law and legal systems; and to remember that in every system of law there is always the inherent danger that the legal system might be perverted by the aggressor for his own aggressive purposes against the very persons whom the law was designed to protect - a danger which can be averted only by vigilance to maintain the internal strength of the law and the power of the law-abiding.

Admidst the tensions of the new post-war conflicts the members of the Tribunal might have succumbed to a feeling that their task was a futile one. It is of the utmost significance that they did not succumb, but, even under the impact of events which might foreshadow a conflict more horrible than the one just concluded, they elected to reaffirm as an act of faith, their conviction that war was not a necessary concomitant of international life and that acknowledged principles of law and justice were fully applicable to nations and their leaders. Whatever may be the ultimate decision on the merits of its judgment, perhaps the real significance of the work of the Tokyo Tribunal lies in this act of faith.

\* See footnotes 16, 17 and 18 to this Chapter.

## APPENDIX IV

## AMENDMENTS TO THE AUSTRALIAN WAR CRIMES ACT 1945

Early in 1986 public allegations were made in Australia that large numbers of persons who had committed serious war crimes 'related to the activities of Germany during World War II' had entered Australia illegally after the conclusion of the war and that many of them were still resident in Australia, including some who had acquired Australian citizenship.

On 25 June 1986 the Federal Government commissioned Mr. A.C. Menzies, a retired officer of the Attorney-General's Department, to carry out a review of all material relevant to the allegations.

Mr. Menzies submitted his report to the Government on 28 November 1986. His Review concluded that it was more likely than not that persons who had committed serious war crimes in World War II had entered Australia.

At the time the Review was tabled in the Senate, a statement was made by Senator the Hon. G.J. Evans by way of a summary of its contents. He stated:

With his Report, Mr. Menzies has provided a list of the more significant instances of allegations that particular persons now in Australia have committed serious war crimes. Some 70 people have been identified as warranting further inquiry. They originate in a number of countries and the Review has stressed that they are only a minute proportion of the enormous number of persons who came to Australia from those areas and who have made such a significant contribution to Australia's development. Mr. Menzies has recommended that the list should not be divulged, except to whatever body is charged with taking further action on the Report.

A Bill to amend the 1945 Act to make provision for the prosecution of war criminals in Australian courts, under Australian law, was introduced in the House of Representatives on 28 October 1987. Although it was ultimately passed by the Parliament, its passage was slow and tortuous, and there was a lack of bipartisan support for its rationale. The Federal Government has given little indication of its intentions, and at the time of the submission of this thesis, it is not practicable to state whether or not any prosecutions are likely to result. Consequently, the author has not attempted any analysis of the detailed provisions of the legislation.

## CHAPTER 15 THE APPLICATION OF 'NUREMBERG LAW' FROM THE 1940's TO THE PRESENT TIME

### INTRODUCTION

More than forty years have elapsed since the Nuremberg Judgment was delivered. By 1989, forty years will have passed following the completion of the deliberations of the Tokyo Tribunal and the 'Subsequent Proceedings' at Nuremberg. War crimes trials continue in the Federal Republic of Germany and in the German Democratic Republic, although at an ever decreasing level. The spectre of Nuremberg has emerged in Australia (see Chapter 14). Scholars, historians and other writers 'revisit' Nuremberg from time to time. Occasionally, notorious war criminals such as Klaus Barbie and John Demjanjuk, attract international attention. In the background, there remain the 'Nuremberg Principles'. It therefore seems apposite to attempt in this chapter an appraisal of the continuing validity of the Nuremberg principles from the viewpoint of positive international law, a historian may include in any such appraisal a consideration of political attitudes and policies, perceptions of public morality and philosophical tenets. However, such matters are not within the scope of this study; the viability of 'Nuremberg Law' will be examined only in a legal context and by means of references to legal institutional and constitutional developments, including practical curial application.

There can be no doubt that the London Agreement and Charter, and later the I.M.T. Judgment, had a profound influence on the emergence of widespread national legislation, as well as on the formulation of national attitudes and policies generally, in relation to war crimes and their punishment. This development was manifest in two principal respects: (a) specific legislation as a basis for national prosecutions; (b) the detailed provisions of Armistice Agreements and Peace Treaties.

It is proposed in this chapter initially to refer to some of those developments, with examples of the application of the Nuremberg principles, and then to deal in more detail with some specific national approaches.

### NATIONAL LEGISLATION AND TRIALS

The London Agreement and Charter, executed by the four major Powers, was adhered to, pursuant to Article 5 of the Agreement, by nineteen nations.<sup>1</sup> Of the adherents, a number enacted legislation which expressly embodied Article 6 of the London Charter. However, in some other countries, for example France, Norway, the Netherlands, Belgium, Canada and Luxembourg, there was no such specific enactment of Article 6, at least in its totality, usually because of national legislative and constitutional constraints.<sup>2</sup>

Australia not only adhered to the London Agreement, but the Commonwealth Parliament also enacted the War Crimes Act 1945, to which assent was given on 11 October 1945 (see generally, and for recent legislative provisions, Chapter 14). In that statute, 'war crime' was thus defined:

- (a) a violation of the laws and usages of war; or
- (b) any war crime within the meaning of the instrument of appointment of the Board of Inquiry appointed on the third day of September [1945] under the National Security (Inquiries) Regulations ...

It is noteworthy that the Australian statute was given extra-territorial effect, in that it expressly extended to a 'war crime' committed in any place whatsoever, whether within or beyond Australia, during 'any war' (defined as meaning 'any war in which His Majesty has been engaged since the second day of September [1939]'). The instrument of appointment referred to in the 1945 Act provided that 'war crimes' included an offence defined in terms identical with those of Article 6 (a) of the London Charter.<sup>3</sup> The Australian statute was the jurisdictional

basis for the mixed inter-allied military courts which functioned for several years (see Chapter 14).

Thus, by 1946, the vast majority of the civilised nations of the world, by being a party to the London Agreement and Charter, or by adhering to it, or by separate national legislation had accepted as embraced within the doctrines of positive international law the letter and the spirit of the instruments which lay at the foundations of the principal trial of German major war criminals at Nuremberg.

Two significant cases, illustrative of national trials which derived their jurisdictional basis, wholly or partly, from Nuremberg Law (8 August 1945 - 1 October 1946), will now be considered.

The trial of Artur Greiser.<sup>4</sup> This trial was before the Supreme National Tribunal of Poland, between 21 June and 7 July 1946. Its jurisdiction and powers had been defined by decrees of 31 August 1944 and 16 February 1945 (promulgated before the German capitulation). The Tribunal itself established by a decree of 22 January 1946 'for the trial of persons who, in accordance with the Moscow Declaration, will be surrendered to the Polish prosecuting authorities for crimes committed on Polish territory during enemy occupation'.<sup>5</sup> On 25 September 1945 the Polish Government had expressed its adherence to the London Agreement.

The indictment contained many Counts, some of which were underscored by allegations of the involvement of the accused in the activities of the N.S.D.A.P. as Governor and Gauleiter of Poznan and 'aggression'; there were numerous other charges of the commission of war crimes and 'crimes against humanity'. The indictment recorded the principal events in the development of international law in relation to aggressive war.

The case was concluded and judgment delivered some months before the I.M.T. Judgment was pronounced, but in relation to the charge of membership of a criminal organisation the Tribunal based its finding of guilt on a combination of the London Agreement and Charter and provisions of the Polish Criminal Code. The Tribunal found the accused guilty of all charges except that he did not personally commit any murders or acts of cruelty. He was sentenced to death and hanged.

The complicated state of Polish law at the time tends to obscure the basis for the Tribunal's verdict. Subsequently, a number of changes in the law were made and the jurisdiction of the Supreme National Tribunal was expanded.

There is no doubt that the judgment in the case of Greiser was an affirmation of the London Agreement; moreover, it anticipated in some respects the Judgment of the I.M.T.: for example, in relation to aggression and the defence of superior orders.

The trial of Takashi Sakai.<sup>6</sup> The accused served as a Japanese military commander in China during the 1939-45 war, and previously during the Sino Japanese hostilities which followed the Mukden incident of 1931. The charges against him were described as constituting crimes against peace, war crimes and crimes against humanity. In addition, some charges, were laid under Chinese municipal law and involved offences against the internal security of the State.<sup>7</sup>

The judgment of the Tribunal was delivered on 29 August 1946,<sup>8</sup> prior to amending legislation of 24 October 1946.<sup>9</sup> At the time of the trial, Article 1 of the Chinese Rules governing the Trial of War Criminals provided for the application of a combination of the 'rules of international law' and municipal law.<sup>10</sup>

The accused was found guilty 'of participating in the war of aggression, war crimes and crimes against humanity'. He was sentenced to death.

The significance of the case is that the judgment preceded that of the I.M.T. by several weeks, and the Tribunal convicted the accused of 'crimes against peace' on the basis that he had, while occupying a command military position, participated in operations which formed part of a war of aggression. This view was significantly broader than that adopted by the I.M.T.<sup>11</sup>

With the exceptions of the I.M.T., the Tribunals established for 'Subsequent Proceedings' at Nuremberg and the

Tokyo Tribunal, the vast majority of the reported war crime prosecutions relate to 'war crimes' in the strict sense or, in some cases, 'crimes against humanity'. For example, of the 89 cases reported in the series, comprising 15 parts, prepared by the United Nations War Crimes Commission, nearly all deal with trials before military tribunals, variably constituted, while a small number relate to prosecutions under national legislation for crimes generically classified as 'violations of the laws or customs of war' or for the breach of specific provisions of national statutes. This situation is understandable because the major German war criminals, charged with, or convicted of, crimes against peace were indicted at Nuremberg.

More illumination is shed on the affirmation of Nuremberg Law by the legislative acts of national parliaments rather than by national prosecutions under laws similar to Article 6 (a) of the London Charter.<sup>12</sup>

## ARMISTICE AGREEMENTS AND PEACE TREATIES

As was pointed out by Professor Brownlie,<sup>13</sup> armistice agreements, with Bulgaria, Rumania, Hungary and Finland provided that those countries would 'co-operate in the apprehension and trial of persons accused of war crimes'. The subsequent peace treaties concluded with those and other countries contained more detailed provisions.<sup>14</sup>

There is little consideration in texts of the provision in Article II of the Treaty of Peace between the Allied Powers and Japan, signed at San Francisco on 8 September 1951, in the following terms:<sup>15</sup>

Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan ... [there followed references relating to clemency, reduction of sentences and parole].

Professor Brownlie has referred to Article II above without comment.<sup>16</sup>

It is submitted that, as a matter of construction, Article II was intended to refer only to the execution of sentences imposed by the Tokyo Tribunal and other courts and not to be tantamount to any endorsement of principles propounded in the judgments.

It is noteworthy that shortly before the Treaty with Japan was signed, East Germany, Albania, Bulgaria, Hungary, Poland, Rumania and the Outer Mongolian Republic almost simultaneously enacted legislation described as 'Law on Defense of Peace'.<sup>17</sup> The statements in those laws strongly attacked the policies of the major Western Powers, but are significant in the present context because they referred to crimes against humanity, aggression and crimes against peace. Thus seven countries without Western alliances, and obviously with a common purpose, recognised, whatever their motives were at the time, that the actions of States could amount to crimes against peace and crimes against humanity. However, the genesis of the seven laws was the allegation of existing war propaganda and incitement to aggressive war, and as such they are only indirectly relevant to Article 6 (a) of the London Charter.

## THE PROSECUTION OF NAZI CRIMES BY GERMAN LEGAL AUTHORITIES IN THE FEDERAL REPUBLIC OF GERMANY FROM 1945 ONWARDS

The first formal step to invest German courts with clear jurisdiction after the surrender of Germany was taken by the promulgation on 30 October 1945<sup>18</sup> of Allied Control Council Law No. 4 on the 'Reorganisation of the German Judicial System'. Article III provided that the 'jurisdiction of German courts shall extend to all cases both civil and criminal with the following exceptions: ...

- (b) criminal offences committed by Nazis or any other persons against citizens of Allied nations and their property, as well as attempts directed towards the re-establishment of the Nazi regime, and the activity of the Nazi organisations.

Very shortly afterwards, Control Council Law No. 10 of 10 December 1945 became effective<sup>19</sup> (see Chapter 13). Law No. 10 conferred limited jurisdiction on German courts which 'shall have the right to cause all persons as arrested ... to be brought to trial before an appropriate tribunal. Such tribunal may in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German court, if authorised by the occupying authorities'.

Similar jurisdictional powers were subsequently conferred on German courts in the British, American and French Occupation zones.<sup>20</sup>

Ruckerl<sup>21</sup> has provided a penetrating analysis of the reasons why the German public generally 'adopted a reserved and indeed censorious attitude towards the trials conducted not only by the tribunals of the Occupying Powers, but also by the German courts and prosecuting authorities in connection with the crimes committed during the Nazi regime'.<sup>22</sup> A prime factor which contributed to this attitude was the dubious and unsavoury character of the so-called 'denazification process', the result of which is thus described by Ruckerl:<sup>23</sup>

When the denazification courts and tribunals completed their activities in the first half of the 1950s, they could claim to have passed sentences ranging from fines to terms of several years imprisonment on over one and a half million people in the three Western Zones of Occupation alone ... Many people held the erroneous view--and apparently still hold it today [1979]--that the trials by German courts merely represented a continuation of denazification under another name.

It is not difficult to appreciate the further observation of Ruckerl:<sup>24</sup>

By comparison [with crimes under domestic law] secondary importance attached to the acts constituting a crime against peace: these were unique until that point of time in that they were unknown in the German and foreign penal codes. The only one among the accused to be condemned by the International Military Tribunal in Nuremberg solely by applying the then non-codified legal characteristics of a crime against peace was Rudolph Hess (emphasis added). [in fact Hess was convicted under Counts 1 and 2].

A consideration of the facts stated by Ruckerl, including statistics,<sup>25</sup> leads to the conclusion that few, if any, of the trials of German war criminals by German Courts after 1945 up to the present time involved the principles of 'Nuremberg Law', but that they were concerned only with crimes cognisable under German domestic law. There were many difficulties, including numerous changes in the law relating to limitation of proceedings, the specific provisions of the German Penal Code, constraints under the German Basic Law, problems in locating witnesses and documents and a prevalent view that the goal of 'coming to terms with the past had now been reached'.<sup>26</sup> One possible exception to this conclusion relates to the fact that, according to statistics provided to the writer by the German Federal Ministry of Justice, German courts pronounced 730 sentences from 1950 to 1951 on the basis of Control Council Law No. 10 (see Chapter 13) in legal proceedings involving Nazi crimes against German nationals or stateless persons.<sup>27</sup>

More significant than the post-war trials in Germany in relation to the policies of the Republic is the provision (Article 26) in the 1949 German Basic Law of the following prohibition of wars of aggression:

Acts tending to and undertaken with the intent to disturb the peaceful relations between nations, especially to prepare for aggressive war, shall be unconstitutional. They shall be made a punishable



offence.

By comparison, the Italian Constitution of 1947 was less positive than the German provision. Article II provided that 'Italy repudiates war as an instrument of aggression against the liberties against other peoples and as a means of settling international difficulties ...'.

A number of other States have adopted similar Constitutional provisions.<sup>28</sup>

## TRIALS BY COURTS IN THE GERMAN DEMOCRATIC REPUBLIC AND IN EAST BERLIN

Brief reference should be made to the attitude of the German Democratic Republic (GDR) to war crimes trials. The statistics, claimed by the GDR to be accurate in this respect, are contained in an article in a semi-official publication in 1985 by Borchert.<sup>29</sup>

Omitting the bias expressed against the Federal Republic of Germany, the article is important because of the following statement by Borchert:<sup>30</sup>

The consistent prosecution and punishment of war crimes and of crimes against humanity was and continues to be for the German Democratic Republic and for its organs of criminal prosecution and judicial bodies always a command of international law and a historic task. The Nuremberg Principles have found their legal expression in the legal system of the GDR. Thus in the Criminal Code of the GDR of 12 January 1968, sections 85-89 and 91-93, the principles of the IMT Statute have been made a constituent part of domestic law.

It was already on 1 September 1964 that the People's Chamber of the GDR in conformity with the international legal position had passed a law to abolish time limits for the prosecution of nazi and war crimes. In the GDR Constitution of 6 April 1968, in pursuance of the stipulations of the Constitution of 7 October 1949, the Nuremberg Principles, including the principle not to apply statutory limitation to this category of crimes, were adopted as principles of the Constitution. Article 91 reads as follows: 'The generally accepted norms of international law relating to the punishment of crimes against peace and humanity and of war crimes are directly valid law. Crimes of this kind do not fall under the statute of limitations'.

The exclusion of statutory limitations for crimes against peace, humanity and human rights and for war crimes is reaffirmed in section 84 of the Criminal Code of the GDR.

The following statistics are provided in Borchert's article:<sup>31</sup>

On the territory of the German Democratic Republic, altogether 12,873 war criminals and persons guilty of crimes against humanity were finally tried from 1945 to 31 December 1984 under international law according to the degree of their guilt within the system of mass-scale fascist crimes. This was also in line with the instructions of the bloc of all antifascist and democratic parties which had adopted a resolution on the purge of Germany from the remnants of fascism already on 20 October 1945. From this fact the task emerged for German courts 'to decide in their own competence on such crimes committed by Germans because of nazi convictions which are not condemned by the courts of the United Nations' and 'immediately and with the utmost energy, in cooperation with the antifascist forces of the German people to initiate all measures which are necessary for the prosecution of the nazi crimes'.

....

By 1960 already, the courts of the GDR sentenced 12,147 war criminals and persons guilty of

crimes against humanity. Among them were not only members of execution squads, but also judges and prosecutors of the nazi regime, euthanasia criminals and also top managers in corporations who had abused their work to commit most abominable crimes.<sup>32</sup>

## THE TRIAL BY ISRAEL COURTS OF ADOLF EICHMANN

The trial of Adolf Eichmann merits some additional mention in this chapter, apart from the consideration of it in the limited context of Chapter 12, if only because of its widespread notoriety. It should not, however, be regarded as exemplifying principles of 'Nuremberg Law' or in itself as contributing to the body of international law. It was unique.

As is well known, Eichmann was, between 1942 and 1944, the Chief of the Jewish Affairs Section of the Reich Security Head Office, the essential task of which was the supervision of the so-called 'final solution of the Jewish question'. He had been the 'architect and chief exponent of the policy which resulted in the deaths of, on a general estimate, nearly six million persons. He had escaped to Argentina, but was captured in 1960 and taken to Israel for trial. He was indicted on fifteen Counts before the District Court of Jerusalem in 1961 on charges of 'crimes against the Jewish people', as defined in the Israeli law of August 1950 in these terms:

killing Jews; causing serious bodily or mental harm to Jews; placing Jews in living conditions that are calculated to bring about their physical destruction; devising measures intended to prevent births among Jews; forcibly transferring Jewish children to another national or religious group; destroying or desecrating Jewish religious or cultural assets or values; inciting to hatred of Jews.<sup>33</sup>

The Israeli law substantially followed Article II of the 1948 Genocide Convention.

The root basis for the jurisdiction of the Court was the Nazis and Nazi Collaborators (Punishment) Law (see Chapter 12).

Professor Woetzel, in a postlude to the second impression of The Nuremberg Trials in 1962, canvassed at length the arguments for the defence and the suggestion that an international trial would have been preferable. With full respect, the writer finds it difficult to accept the view expressed in the postlude that '... the legal basis of the Eichmann trial can be considered controversial'.<sup>34</sup> In legal writings it has, of course, been a matter of disputation.<sup>35</sup>

It is true, as inevitably had to happen, that every conceivable defence was argued and, so far as the defence of superior orders was concerned, even Kant's 'categorical imperative' was invoked. But the Court dealt in a reasoned and unbiassed manner with the defence arguments. As Professor Woetzel has stated,<sup>36</sup> the Court's view, in general terms, was:

Our jurisdiction to try this case was based on the Nazis and Nazi Collaborators (Punishment) Law, a statutory law the provisions of which are unequivocal. The court has to give effect to the law of the [Parliament], and we cannot entertain the contention that this law conflicts with international law. On the contrary we have reached the conclusion that the law in question conforms to the best traditions of the law of nations.

More specifically, the Israel court relied on the pronouncements of the I.M.T. (see the I.M.T. Judgment at pp. 60-64 and especially the references to Eichmann at pp. 62 and 64).

Further, the Court said:<sup>37</sup>

Israel's 'right to punish' is based, with respect to the offences in question, from the point of view of international law, on a dual foundation: the universal character of the crimes in question and their specific character as being designed to exterminate the Jewish people ... These crimes which afflicted the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself....

.....

And again:

... all that has been said in the Nuremberg principles on the 'crime against humanity' applies a fortiori to the 'crime against the Jewish people'.<sup>38</sup>

It is appropriate to cite the final statement of Professor Woetzel:<sup>39</sup>

.... International law grows also through cases in national jurisprudence, as has been shown. Just like the first Allied national tribunals which tried war crimes were followed by acceptance of the universal principle of jurisdiction to cover war crimes in the Geneva Convention, the Eichmann case adds to the body of evidence which could justify in future the application of this principle by national courts in cases involving genocide, if confirmed by practice and agreement. Even though it is not an international trial, it may in that sense have contributed significantly to the development of international law. It also achieved the purpose of showing the world what heinous destruction may be wrought through human prejudice and intolerance.

The emphasised words in the passage cited above detract from the general viewpoint therein expressed. So far as 'agreement' is concerned, the terms of the Genocide Convention approved by the General Assembly of the United Nations at Paris on 9 December 1948 are explicit. Article I provides:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under inter-national law which they undertake to prevent and punish.

Article III of the Convention provides that the following acts shall be punishable: (a) Genocide, (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide.

The Convention was signed by twenty States immediately after its approval and entered into force according to its terms. Subsequently many other States signed the Convention.<sup>40</sup>

The Genocide Convention Act 1949 provided for the ratification of the Convention by Australia.

So far as 'practice', as the word is used in the cited extract, is concerned, it does not appear necessary for there to be repetitions of acts of genocide before there is unqualified acceptance of the fact that genocide is recognised by civilised State's as being contrary to inter national law as a criminal and punishable act, as indeed it was at the time of the trial of Eichmann under the statute law of the State of Israel.

It is proper to regard the case of Eichmann as sui Generis.<sup>41</sup>

## THE TRIAL OF FIRST LIEUTENANT CALLEY

Against the background of the major involvement of America in the prosecution of war criminals at Nuremberg extending over nearly four years, from 1945 to 1949, there emerged in the late 1960s the case of First Lieutenant William L. Calley, a platoon leader in operations in the village of Son My, (more commonly, but inaccurately, described as My Lai), South Vietnam, on 16 March 1968. The facts have been sufficiently stated in Chapter 12.

The legal proceedings in the Calley Case were pending when Brigadier General Taylor's book Nuremberg and Vietnam : an American Tragedy was published in 1970, and he avoided comment on the question of the criminal responsibility of Calley and his associates. Nevertheless, he stated:<sup>42</sup>

Whether the killings constituted a war crime is the question first to be examined and, for this purpose, it can be taken as undisputed that on March 16, 1968, American troops at Son My killed a large number of the village residents of both sexes and all ages. According to President Nixon, who presumably was well briefed: 'What appears was certainly a massacre, under no circumstances was it justified.....We cannot ever condone or use atrocities against civilians.....'.<sup>43</sup>

Military aspects of the massacre are detailed by Brigadier General Taylor,<sup>44</sup> but are not relevant to this section, which is concerned with the legal sequel.

The Calley Case began on 5 September 1969 and ended on 5 April 1976 when the Supreme Court of the United States denied a petition for a writ of certiorari directed to the United States Court of Appeals for the Fifth Circuit. During that period of more than six years, there was a multiplicity of trial, review and appeal proceedings, in which, in order, Calley initially was convicted and sentenced to imprisonment for life, the sentence was reduced to twenty years in prison and later by executive action to ten years, the conviction was set aside by a District Judge whose judgment was reversed on further appeal and finally another attempt at review failed before the United States Supreme Court, without reasons being assigned.<sup>46</sup> It is proposed to refer only to the judgment of the last appellate court in which reasons were stated - that is, the United States Court of Appeals for the Fifth Circuit ('the Appeal Court').<sup>47</sup>

The Appeal Court stated that all charges could have been laid as war crimes, but were prosecuted under the Uniform Code of Military Justice (Field Manual 27-10, paragraph 507b, *The Law of Land Warfare* (1956)). The defence plea of superior orders has been considered in Chapter 12. It was condignly rejected.<sup>48</sup> Defence counsel presented thirty-one assignments of error, many of them technical, but all were refused. There was also a petition for a new trial on the basis of newly discovered evidence; it was denied. In relation to the sentence of twenty years imprisonment the Appeal Court observed:<sup>49</sup>

The approved sentence is not too severe a consequence of his choosing to commit mass murder.

On analysis, the Calley Case was simply one of multiple murder. Hysterical media coverage, numerous books and articles, and a long-sustained publicity campaign concerning the American 'conscience' and 'the immorality of an act of Government' cannot elevate the case to any level above that of a crime against the established code of military behaviour. 'Nuremberg Law' was irrelevant.

The only relevant significance of the case is that in the first American trial of any notoriety since 1949 at Nuremberg, before a national tribunal, a sentence of twenty years imprisonment was considered appropriate in a case of mass murder, and was reduced ultimately to one of ten years. It is unnecessary to compare the result of the Calley Case with the pronouncements by the prosecutors at Nuremberg, because such a comparison would involve principles of morality, not law, and consequently is not within the scope of this study.

## CONCLUSION

There can be no doubt in the light of the foregoing analyses that the Nuremberg principles became recognised as a constituent part of positive international law within a short time after they were promulgated, and that, regardless of some politically inspired aberrations (such as the Vietnam War and the Russian invasion of Afghanistan), they remain an entrenched segment of international law. The principal unresolved problem is the method of their enforcement.

Professor Brownlie convincingly demonstrated the recognition of the Nuremberg principles in his

survey of national court decisions and legislation.<sup>50</sup> In the fifteen-part series of reports prepared by the United Nations War Crimes Commission, there is also a detailed summary of relevant references to acceptance of 'Nuremberg Law'.<sup>51</sup>

Commencing with its resolution on 13 February 1946,<sup>52</sup> in which it noted the definitions of crimes against peace, war crimes and crimes against humanity in the London Charter, the United Nations has consistently recorded its affirmation of 'Nuremberg Law'.<sup>53</sup>

Professor Brownlie concluded his survey of the acceptance of the principles of the London Agreement and Charter as follows:

It is submitted that the majority of states are now estopped from denying that the substantive aspects of the Charter and Judgment of Nuremberg have become part of the positive law. Moreover, in spite of doubts expressed by some members of the International Law Commission, they are accepted as law by the majority of jurists and in authoritative works.<sup>54</sup>

Whatever view may be taken of the jurisdictional validity of the London Agreement and Charter, the writer, for the reasons stated in this chapter, argues that there is no room for doubt that within a short time of the delivery by the I.M.T. of its Judgment, the vast majority of the civilised nations of the world, by express action, legislative or political, chose individually, and at times collectively, to proclaim their own judgment that 'Nuremberg Law' was a reality as part of the general body of international law. It does not appear that any court or tribunal has expressed any doubt about that reality. Four decades have passed and the fundamental fact of the continuing existence of the reality stands virtually unchallenged and is irrefutable.

## NOTES

1. The adhering nations are named in the Judgment of the I.M.T., p. 1.
2. History of U.N.W.C.C., p. 216 and passim. France ratified the London Agreement and Charter by a decree dated 8 October 1945, so that it became formally recognised by French Courts (see the judgment of the Cour de Cassation (Chambre Criminelle), cited in Brownlie, op. cit., p. 177, footnote 7).
3. History of U.N.W.C.C., p. 216.
4. Law Reports, U.N.W.C.C., XIII, p. 70.
5. For a detailed exposition of Polish law concerning the trials of war criminals, which is extremely complex, see Annex to Law Reports, U.N.W.C.C., VII, pp. 82-97, from which the following is an extract: 'Nor does the Polish war crimes legislation contain a definition or reference to 'crimes against peace' (except for the case of criminal organizations). This has not, however, been an obstacle preventing the Polish Courts from dealing with these types of crimes. In such cases the problem of criminal acts coming within the notion of crimes against peace can easily be solved within the framework of Polish municipal law'.
6. Law Reports, U.N.W.C.C., XIV, p. 1.
7. Ibid.
8. Brownlie, op. cit., p. 181, footnote 4.
9. Law Reports, U.N.W.C.C., XIV, p. 3, note 1.
10. For a detailed account of Chinese law concerning the trials of war criminals, see ibid., Annex, pp. 152-160.
11. See Brownlie, op. cit., p. 182.
12. Details of such laws are contained in a number of Annexes to volumes of the series Law Reports, U.N.W.C.C.; see also Brownlie, op. cit., pp. 175-182.
13. Brownlie, op. cit., p. 182.
14. A typical such provision was made by Article 45 (1) of the Treaty between the four major Powers and Italy, signed at Paris on 10 February 1947, as follows: '1. Italy shall take all necessary steps to ensure the apprehension and surrender for trial of (a) Persons accused of having committed, ordered or abetted war crimes and crimes against peace or humanity ...'. Article 45 (2) provided that: 'At the request of the United Nations Government concerned, Italy shall likewise make available as witnesses persons within its jurisdiction, whose evidence is required for the trial of the persons referred to in paragraph 1 of this Article'. The view is taken by Brownlie, op. cit., p. 183 that those who drafted the peace treaties intended that the expression 'crimes against peace' should have the same denotation as in Article 6 (a) of the London Charter. The same opinion is expressed in History of U.N.W.C.C. at p. 211.
15. (1952) 46 A.J.I.L., Supplement, p. 71.
16. Brownlie, op. cit., p. 184.
17. (1952) 46 A.J.I.L., Supplement, pp. 99-105.
18. Official gazette, Control Council, 20 November 1945, p. 20 et seq.

19. Official gazette, Control Council, 20 December 1945, p. 50 et seq.
20. See generally Ruckerl, The Investigation of Nazi Crimes 1945-1978, pp. 32-71. Adalbert Ruckerl was, at the time of the publication of this work in 1979, Head of the Central Office of the Land Judicial Authorities and Chief Prosecutor, offices which he had held since 1966.
21. Ibid., pp. 36-39.
22. Ibid., p. 39.
23. Ibid.
24. Ibid., p. 37 and footnote 5 (p. 136).
25. Ibid., pp. 32-71.
26. Ibid., p. 46.
27. Ibid., p. 40 . The charges involved in those cases are not known, as records of them are not readily available from German authorities, despite inquiries. However, the Office of the German Minister of Justice furnished the writer with precise analytical details of 'the state of National Socialist crimes prosecution as of 1 January 1985'. The analysis shows some continuation of prosecution activity since the publication of the statistics by Ruckerl in 1978 (ibid., appendix 1, p . 121 ), but the existing statutory limitation provisions affect that activity. Ruckerl observed in 1978 that 'the chances of bringing to trial Nazi criminals detected after 31 December 1979 are extremely remote for the reasons stated above: the age of the accused; the growing difficulty of investigating the crimes and adducing proof; and the relatively long duration of the legal procedure ' (ibid. , p. 120) .
28. Details are given by Brownlie, op.cit., p.187, especially in footnote 5.
29. GDR Committee for Human Rights, Bulletin I /85, Liberation--Peace---Self-determination, Article by Karl-Heinz Borchert, Deputy Procurator General of the GDR, Member of the GDR Committee for Human Rights, pp. 24-31.
30. Ibid., pp. 25-26.
31. Ibid., p. 27.
32. For a commentary on the fairness of trials conducted in the GDR see Ruckerl, op. cit., pp. 72-73.
33. Woetzel, op. cit., p. 248, footnote 5.
34. Ibid., p. 271.
35. A discussion of a diverse range of views concerning Eichmann, 'The Man', by M.W. Jackson, Department of Government, University of Sydney, was published in the Bulletin of the Australian Society of Legal Philosophy, vol. 9, No. 34, October 1985, but the author's treatment of the subject is essentially from the viewpoint of philosophy rather than of law.
36. Woetzel, op. cit., p. 252, footnote 8.
37. Ibid., p. 259.
38. Ibid., p. 263.

39. Ibid., pp. 271-2.
40. For details of the Signatory States and the dates of the deposit of instruments of ratification or accession, see Nehemiah Robinson, The Genocide Convention: A Commentary, Institute of Jewish Affairs, World Jewish Congress, New York, 1960.
41. Dr. Yosai Rogat, The Eichmann Trial and the Rule of Law, Center for the Study of Democratic Institutions, Santa Barbara, California, U.S.A., 1962, stressed the 'reciprocal relationship' between legal rules and moral attitudes. However, I consider his treatment of the contentious legal issues involved is often simplistic, pedantic and devoid of practicality, especially his argument that an international court should have been the forum for the trial of Eichmann rather than a court of Israel (pp. 32-40). Nearly twenty years after the relevant events had occurred, it is most unlikely that a responsible international court could have been constituted by agreement among States.
42. Taylor, op. cit., p. 126.
43. President Nixon, nationally televised news conference, 9 December 1969. (Source: Goldstein et al., op. cit., infra, p. 544).
44. Taylor, op. cit., pp. 126-129.
45. 96 U.S. Supreme Court Reporter, p. 1,505.
46. The chronology of the legal proceedings is contained in pp. ix to xi of The My Lai Massacre and Its Cover-up, Goldstein et al., New York, 1976.
47. (1972-73) 46 Court-Martial Reports, p. 1131.
48. Ibid., p. 1183.
49. Ibid., p. 1196.
50. Brownlie, op.cit., pp. 185-188, especially the footnotes and the references to the national documents reproduced in (1952) 46 A.J.I.L., Supplement, pp. 34 et seq. and pp. 99 et seq. . (see footnote 17 supra).
51. Law Reports, U.N.W.C.C., XV, pp. 138-150 under the sub-heading of 'Crimes Against Peace'.
52. General Assembly Resolution No. 95.
53. For example, the memorandum submitted by the Secretary-General, 1949, The Charter and Judgment of the Nuremberg Tribunal History and Analysis, substantially concerned the consideration in the United Nations of plans for the formulation of the principles- of the Nuremberg Charter and Judgment, as well as the application of the Charter by the I.M.T. (For a more detailed examination of United Nations Organisation decisions and dicta, see Chapter 16, especially in relation to the activities of the International Law Commission).
54. Brownlie, op. cit., pp. 193-194.



## CHAPTER 16 POST NUREMBERG: THE UNITED NATIONS ORGANISATION

### INTRODUCTION

The significance of the legal pronouncements of the Nuremberg and Tokyo Tribunals and in the 'Subsequent Proceedings' at Nuremberg can, in practical terms, only be gauged in the light of the achievements of the United Nations Organisation (U.N.O.) towards entrenching the principles of those judgments as an accepted part of international law, so far as member states of the Organisation are concerned.

This chapter contains a very brief survey of the progress of the U.N.O. towards that goal and an expression of the writer's opinion on the nature and extent of the progress.

### INITIAL STEPS OF THE UNITED NATIONS ORGANISATION

In a resolution adopted on 11 December 1946, the General Assembly affirmed 'the principles of international law recognised by the Charter of the Nuremberg Tribunal' and directed the Committee on the Codification of International Law 'to treat as a matter of primary importance plans for the formulation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognised' in the Nuremberg Charter and the Tribunal's Judgment.<sup>1</sup>

The Governments which participated in the drafting of the Charter of the United Nations were 'strongly opposed to conferring on the United Nations legislative power to enact binding rules of international law. As a corollary, they also rejected proposals to confer on the General Assembly the power to impose certain general conventions on States by some form of majority vote'.<sup>2</sup>

Nevertheless, the strong support for vesting in the General Assembly of the U.N.O. more limited powers culminated in the inclusion in the Charter of Article 13, which provided that 'the General Assembly shall initiate studies and make recommendations for the purpose of: (a) ... encouraging the progressive development of international law and its codification'.

The 'Committee of Seventeen' held thirty meetings between 12 May and 17 June 1947 and adopted a report recommending the establishment of an international law commission and stating provisions designed to serve as the basis of its statute.

On 21 November 1947 the General Assembly, by resolution 174, established the International Law Commission and approved its statute. It was not, however, until 12 April 1949 that the first annual session of the Commission began.<sup>4</sup>

The work of the Commission (ILC), is well documented.<sup>5</sup> However, the only significant positive development in nearly thirty years was the adoption on 14 December 1974 by the General Assembly of a definition of 'aggression' in the context of a 'war of aggression'.<sup>6</sup>

The road to the adoption of the definition of 'aggression' was long and tortuous. After more than twenty years of discussion of what would be an appropriate definition, the Assembly of the U.N.O. on 18 December 1967 established a Special Committee on the Question of Defining Aggression.<sup>7</sup> The Special Committee met from 11 March to 12 April 1974, and continued its work following a General Assembly decision on 12 December 1973.<sup>8</sup> The resolution of the Assembly on 14 December 1974 was based upon the recommendation of its Sixth (Legal) Committee.<sup>9</sup>

The text of the definition comprised ten preambular paragraphs and eight articles. It is reproduced in Appendix I to this chapter and is discussed later.

## THE LEGAL STATUS OF THE U.N.O. GENERAL ASSEMBLY RESOLUTIONS

Before examining the detail of the definition of aggression and U.N.O. developments following its adoption, it is convenient to consider the legal status, as a matter of international law, of resolutions of the General Assembly, confined to the criminal character of aggressive war.

It has been asserted that 'the inquiry on the legal status of the resolutions of the U.N. General Assembly will ... remain a subject for animated discussion in the years to come.'<sup>10</sup> However, on the proper construction of the U.N. Charter, there does not appear any basis for controversy concerning the legal status of the General Assembly in the context of the peace and security of mankind.<sup>11</sup> The balance of informed opinion is that, in general, the effects of resolutions of the General Assembly 'are not of "legal nature" in the usual sense, but rather of a moral or political character'.<sup>12</sup>

In the writer's view it is difficult to attribute to the resolution of the General Assembly endorsing, or purportedly expanding, 'Nuremberg Law' anything other than a morally and politically persuasive force. But to say that, is not to depreciate the significance of consensus, among a preponderance of states, relating to the development of principles of international criminal law which could be applied in expanding international criminal jurisprudence in a manner analogous to that of the common law (see Chapter 18).<sup>13</sup>

## THE DEFINITION OF AGGRESSION : AN ANALYSIS

The definition of 'aggression' in the Oxford English Dictionary, vol. I, p. 38 is simply expressed as 'an unprovoked attack; the first attack in a quarrel; an assault'.

Despite the simplicity of the basic concept of aggression, nearly three decades passed before the U.N.O. was able to reach any agreement, either unanimously or by consensus, on what acts constituted 'aggression' in international relations. This is not surprising for two principal reasons.

First, for more than 2,000 years sporadic efforts had been made to outlaw international aggression, including the exhortation of the Chinese philosopher Mo Ti, some 400 years B.C., that wars between nation, be regarded as the greatest of all crimes.<sup>14</sup> 'Nevertheless wars remained the accepted national resort, especially in feudal Europe.

Second, despite the Hague Conventions of 1899 and 1907 warfare continued to be the ultimate means of satisfying national aspirations.

The generic definition of 'aggression' in Article 1 of the 1974 definition (see Appendix 1 to this Chapter), although it was the product of compromise, is defective in that it omits any reference to a threat of force, such as preceded the annexation by Nazi Germany of Austria on 13 March 1938, following a series of threats of invasion. Nor does the definition embrace the unconcealed preparations by Nazi Germany to attack Czechoslovakia in 1938, combined with the diplomatic treachery which led to the Munich Pact of 29 September 1938 between the United Kingdom, France, Germany and Italy, whereby Czechoslovakia was forced to cede the Sudetenland to Germany. In neither of those cases was there 'use of armed force' as contemplated by Article 1 (emphasis added). Another weakness of the definition is the omission of any reference to economic coercion, political duress or racial reprisals, any one of which may impugn the sovereignty, territorial integrity or political independence of a state.

Article 2 provided that the first use of armed force in contravention of the U.N.O. Charter constitutes prima facie evidence of aggression. It is open to the criticism that it reflects an outmoded view of what is a 'first strike'. In the world today, when many nations have a capacity for sophisticated nuclear war, it could be very difficult to determine which of two antagonists was guilty of the 'first strike'. However, the Article provides that the Security Council is the arbiter of the question whether or not an act of aggression has been committed, but the power of veto may make that authority illusory.

Article 3 enumerated seven categories of acts which would 'qualify' as an act of aggression. Understandably, differing political views and the fears of smaller states that the categorisation proposed would expose them to unacceptable risks resulted in some compromises in the drafting of Article 3. Since all seven categories were made subject to the provisions of Article 2, it is questionable whether, as a matter of drafting, the inclusion of the enumeration in the definition was prudent. It is trite to emphasise that in legal drafting attempts to enlarge upon a primary definition by engrafting onto it some non-exhaustive specific examples often result in difficulties of interpretation.

Although, under Article 4, the Security Council was empowered to determine that other acts constitute aggression, the absence of an independent body that decision-making process is, in my opinion, the most significant weakness of the definition.

Article 5 is the most important provision in the definition, for the purposes of this study. Its terms were:

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.
2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Although during the debates which preceded the approval by the Assembly of the definition, Article 5 was criticized as expressing truisms,<sup>16</sup> it was important that in 1974 the U.N.O. should reaffirm in an appropriate context at least some of the Nuremberg principles. Had it not done so it would be difficult to sustain 'Nuremberg Law' as having continuing relevance as part of international law. However, the failure to qualify the words 'international responsibility' by expressly including in paragraph 2 of Article 5 a reference to individual personal responsibility deprived the Article of the reaffirmative force which should have been integral to it.

Article 6 also has been criticized as 'merely stating the obvious'.<sup>17</sup> I do not share that view. The definition in Article 1 bore the stamp of a statutory expression of the meaning of 'aggression'. As such, it was prudent to ensure that no quirk of interpretation should affect the scope of the U.N. Charter, 'including its provisions concerning cases in which the use of force is lawful'.

Article 7 was designed to protect the 'right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right ...' (emphasis added). The analysis by Ferencz of this Articles is,<sup>18</sup> in my respectful view, incomplete, especially as he describes the Article as 'an even clearer embodiment of fundamental differences'.

Again, it was essential that the paramountcy of the Charter should be preserved, and the text of the Article did so. A definition of aggression was not the place, nor was the time opportune to attempt to reconcile more general differences in political attitudes within the U.N.O.

Article 8 has merely a drafting technique. It did not merit the following comment by Ferencz:<sup>19</sup>

Article 8 gave further reinforcement to those who hoped to read their own meanings into the ambiguous clauses of the consensus definition. It tied everything -- preamble and substantive text -- into one interrelated package.

In the writer's view, the important question was whether or not, by 1974, it was of paramount importance for the U.N.O. to demonstrate that its member states could, at least in substance, reach agreement on what acts constituted 'a war of aggression'. That expression had been used in Article 6 (a) of the Nuremberg Charter of 8 August 1945 as the foundation of the alleged crimes against peace (Count 2 of the Nuremberg indictment).

Despite some criticisms as stated above, the ultimate definition of a 'war of aggression' in 1974 was not without purpose. To some extent it solidified the concept embodied in the London Agreement and Charter; it also set the seal of the approval of the member states to acceptance of the proposition that an aggressive war is a crime which gives rise to international responsibility. In both those respects, the definition was a contribution to the evolution of international law, even though, as will be discussed later in this chapter, it was not accompanied by the emergence of a code of international criminal law and of a body capable of enforcing it, as in municipal law.<sup>20</sup>

## DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

The record of the progress within the U.N.O. of the preparation of a Draft Code of Offences Against the Peace and Security of Mankind is depressingly revealed in an analytical paper prepared by the Secretary-General, dated 16 October 1981.<sup>21</sup> The paper was prepared in accordance with resolution 35/49 of the General Assembly on 4 December 1980, which cursorily surveyed the developments in the consideration by the U.N.O. of a draft code and expressed its intention to discuss the matter again at its thirty-sixth session.

The analytical paper, which set forth the requested views of member states as expressed up to 30 June 1981, made it clear that:

the draft code prepared by the International Law Commission in 1954 was subject to diverse and strong criticism;

For a variety of reasons, many states argued that the time was not opportune to reactivate the preparation of a draft code. For example, the representative of the United States expressed the following view: Since the International Law Commission was currently considering the draft articles on State responsibility 'it would not be wise to resume work on the draft Code, at least until the Commission had made considerable progress in the present tasks'. He also recalled that, when the Commission had considered article 19 of the draft articles on State responsibility relating to international crimes and international delicts, the Special Rapporteur pointed out that it would be inappropriate to deal with that question without first having accepted judicial machinery for determining in what cases the article should apply.<sup>22</sup>

The provisions of the 1974 Definition of Aggression were the subject of criticism by some states. The representatives of the Netherlands said the definition 'did not help in elaborating a code of conduct, precisely because it was not sufficiently exact to be used in the framework of a code laying down individual responsibilities'.<sup>23</sup> The representative of the United States expressed the view that a definition of aggression suited to the purposes of the draft code had not yet been formulated.<sup>24</sup>

On 10 December 1981, the Assembly again referred to the International Law Commission the question of offences against the peace and security of mankind. The Assembly requested the Commission to resume its work with a view to elaborating a draft code which would take into account new developments in international law.<sup>25</sup> Mr. Doudou Thiam was appointed by the Commission to be a Special Rapporteur. He submitted a first report on 18 March 1983.<sup>26</sup>

Mr Thiam's report was only introductory and, in his words, was an 'inventory of the problems, in order to evoke joint thinking and answers'.<sup>27</sup> He said: '... the present report can only be exploratory. Its purpose is to put to the Commission as a whole a number of questions, the answers to which will guide the Special Rapporteur'.<sup>28</sup>

By resolution 38/138 of 19 December 1983, the General Assembly recommended that, taking into account the comments of Governments, whether in writing or expressed orally in debates in the General Assembly, the International Law Commission should continue its work on all the topics in its current programme. Furthermore, by its resolution 38/132 of 19 December 1983, the Assembly invited the International Law Commission to continue its work on the elaboration of the draft Code of Offences against the Peace and Security of Mankind in certain specified areas.

At the subsequent session of the Commission, 7 May to 27 July 1984, it considered the second report of the Special Rapporteur. From the record of that session it is obvious that the Commission had lost direction. It concluded that it should begin by drawing up a provisional list of offences for inclusion in a draft code. (emphasis added). However, it stated: 'there was a general trend in the Commission in favour of including colonialism, apartheid, and possibly serious damage to the human environment and economic aggression in the draft code, if appropriate legal formulations could be found.'

## THE VIEWS AND WORKS OF SCHOLARS AND WRITERS

Outside the confines of the U.N.O., a number of scholars, writers and bodies such as the United Nations War Crimes Commission and the London International Assembly, as well as the State Departments of United States, considered, before and after the end of World War II, the creation of a United Nations War Crimes Court.<sup>29</sup> However, there are no tangible signs that the General Assembly of the U.N.O. has been influenced by the expression of views outside its own purview.

It is beyond the scope of this chapter to consider at length the contributions to the solution of the most difficult problems of an international criminal code and court by persons not directly associated with the U.N.O. However, brief reference will be made to the writings of a small number of scholars.

### Professor Bassiouni

Professor M. Cherif Bassiouni, of DePaul University, published in 1980 a draft criminal code.<sup>30</sup> The code, which is substantive in character, combines two alternative approaches to the future direction of international criminal law. The first is that jurisdiction in respect of international crimes should be vested in an International Criminal Court; the second, which is a recognition of the maxim aut dedere aut iudicare, is that states should enter into a binding International Criminal Code Convention prescribing a code of international crimes, the proscriptions in which would become part of the national law of the parties to the Convention and be enforceable within national criminal justice systems. In a preface to the work, Bassiouni acknowledged that the second view is the contemporary prevailing one. Nevertheless the code recognises each view and is therefore divided into discrete and separable parts in order to accommodate both approaches.

Article 1 of the International Criminal Code embodied the text of the 1974 Definition of Aggression, expressed verbatim and only with changes in numbering. The author recognised some of the criticisms of the definition,<sup>31</sup> but was himself uncritical. His conclusion was:

Despite the problems, the definition evidences a political maturity previously lacking. Both the Security Council and member states have felt the impact of what may become an accepted norm. The definition fills a void which results in the United Nations putting aside work on an international criminal code. This crime includes 'crimes against peace' as defined in the London Charter of 1945 ...<sup>32</sup>

The fact that Bassiouni chose to present a codification of international criminal law on the alternative bases of a supranational criminal code and a resort to a convention, with ultimate enforcement of proscriptions the responsibility of national criminal law systems, demonstrates the two major stumbling blocks to progress in restraining national aggression first the schism between states with respect to the surrendering, of national authority and jurisdiction to an international tribunal with punitive powers; second, the failure, after nearly half a century, to reach a positive and practical exposition by way of definition of the acts which would lead to culpability of both States and individuals (see the conclusion of this chapter).<sup>33</sup> and <sup>34</sup>

### Mr. Benjamin B. Ferencz

Probably the most prolific writer since World War II on issues relating to the enforcement of international law, an international criminal court and the problems involved in a definition of aggression is Benjamin B. Ferencz.<sup>35</sup>

The major works by Ferencz are substantially historical and documentary, but they convey the constant theme that humankind should have the capacity to ensure that international co-operation replaces 'the prevailing international anarchy'. That theme was crystallised in his afterword in Enforcing International Law : A Way to World Peace in these terms:<sup>36</sup>

When it comes to international law enforcement, everything is linked. There can be no social justice without reducing the costs of arms; no disarmament without a peaceful method of settling irreconcilable disputes among states; no court with binding authority to resolve such disputes until states agree to give it the necessary power; no need for an international army if there is no international court; no consent to judicial determinations until there are common norms of international behavior; no agreement on norms until nations with different values develop mutual confidence and a will to compromise in order to enhance the security and well-being of all peoples. Progress must be made in all areas if effective international law enforcement is to become a reality. The ultimate challenge is whether human intellect will prevail over man's destructive capacity.

The thesis which Ferencz has consistently propounded marks a departure from the orthodox jurisprudential approach of legalistic examination of principles. With his ultimate view, as expressed in the above citation, I am bound to concur; however, I would advocate refinements, involving the need for appreciation of practical political realities, which are discussed in the conclusion of this chapter.

#### Professor Brownlie

Although Professor Brownlie's well-known monograph published in 1963 antedated the U.N.O. Definition of Aggression by more than a decade, there is no reason to suppose that his views changed in the light of the 1974 resolution of the General Assembly.<sup>37</sup> He stated:

The failure of various bodies to formulate a definition of aggression indicates the difficulty of the problem but no more. ... The source of confusion would seem to be that the quest for a definition of aggression has become a vast law-making project with many facets. ... Discussion of the 'definition of aggression' is a valuable aid to more effective regulation of conflict, both armed and in other forms, but agreement on what is really a vast field of problems and not merely a definition can hardly be a sine qua non for acceptance of legal norms on the use of force by states.<sup>38</sup>

Brief though Professor Brownlie's consideration of a definition of aggression was, it pinpoints the problem which has engulfed the General Assembly and the International Law Commission for some forty years. The attempt to draft consensually a detailed definition of aggression has failed, and will continue to fail, because of the efforts of some states to engraft onto the basic elements of aggression additional elements which create disputation on political or ideological grounds: for example, consideration of environmental issues.

#### Professor Stone

Professor Julius Stone's treatise Legal Controls of International Conflict was first published in 1954.<sup>39</sup> Thirty four years later it is not difficult to describe as prescient his comments on the International Law Commission's initial consideration of the meaning of 'aggression' in the Draft Code of Offences Against the Peace and Security of Mankind. He stated:

Both the inclusions and exclusions, vague and inexhaustive as they are, leave the Draft Code open to wide diversity of interpretation, and to the evasive and often ingenious resorts in which aggressive Powers have shown themselves adept in face of modern attempts to assert legal control over the resort to war. The prognosis for a Draft Code of which this formulation is the pivot, would not be favourable even if it should ever come into force, though a Tribunal of sufficient calibre and assured impartiality, might -- if it were given the time and the chance -- develop the required precision and comprehensiveness

through a growing jurisprudence.<sup>40</sup>

In my respectful view, Professor Stone's judgment has been completely vindicated by the deliberations of the General Assembly and International Law Commission in subsequent decades. Each of those bodies has allowed itself to be engulfed, to the point of impotence, in the interstices of definition, so far as 'aggression' is concerned.

#### Professor Woetzel

In his work The Nuremberg Trials in International Law, Professor Woetzel discussed uncritically the early deliberations of the International Law Commission on the question of aggression.<sup>41</sup> He described the initial recommendation of the Commission in the Draft Code as a compromise between three different points of view: first, the espousal by the Soviet Union of an exhaustive list specifying each form of aggression ('the enumerative school'); second, the French view which favoured a general formula for aggression, on the ground that with no definition at all the criticism of *nulla poena sine lege* might be brought up, as at Nuremberg, if a new form of aggression occurred ('the general definition school'); third, the 'no definition school', led by Greece, the United Kingdom and the United States, opposed any definition at all (cf. the Nuremberg and Tokyo Charters), arguing that it could not be all-embracing and that an aggressor might be able to circumvent it by committing an aggression in a form not covered in the definition.<sup>42</sup>

It should be stated that the treatment by Professor Woetzel of the problem of what constitutes 'aggression' was in the context of a section of a chapter entitled 'Codification of the Nuremberg Principles and Conclusions', and was not basic to the principal theme of the section. It should not, therefore, be regarded as exhaustive of his views at that time (1962).

#### A British political view

The most forthright public opposition by a senior Minister on behalf of the British Government to the establishment of an International Criminal Court in post-World War II years was expressed by Sir Frank Soskice, the Attorney-General, in an address to the U.N.O. Legal Committee in Geneva in 1951, in which he stated that in the view of the British Government the practical difficulties of setting up an international criminal court would be overwhelming. As reported in the press, he said:

The court would need the power to bring the accused to trial and to see that its sentences were carried out. The accused might be persons with big followings in their own countries. Efforts to bring them before a court would inevitably be resisted, and even if they were ever brought to trial the court would become a political arena rather than a forum of justice.

There would also, he added, be great difficulty in carrying out a sentence. If the court were set up and could not function effectively it would merely become an object of contempt. The Nuremberg Tribunal could not be regarded as precedent. It had been able to function effectively in the unusual circumstances of a total victory after a world war, but such circumstances did not exist in peacetime. He hoped that if an attempt were made even to draft a tentative statute for the General Assembly these considerations would be taken into account.<sup>43</sup>

The writer is not aware of any publicly expressed attitude by any British Government which deviates from the cited remarks of Sir Frank Soskice.

#### Dr. C.A. Pompe

An essentially pragmatic approach to defining the concept of aggression was discussed by Dr. C.A. Pompe in his work published in 1953, but not consistently.<sup>44</sup> He emphasised the distinction between international law and international politics, arguing that the distinction involved practical rather than theoretical questions. He advanced

a suggested definition in these terms:<sup>45</sup>

The use or imminent threat of force on the part of a State, whether acting openly or indirectly, which leaves the State against which it is directed no other than military means to preserve its territorial integrity or political independence, or which disturbs the international status quo in such a way that only a military reaction can maintain the status of territories under an international regime or under the effective jurisdiction of a State.

It is difficult to appreciate how such a definition elucidates the intrinsic qualities of the concept of aggression. On its face the definition has two defects: first, expressed as it is in general terms it still requires that an authoritative body pronounce a judgement on the facts as proved or admitted; second, it does not recognize in a practical way the many disparities between the leading nations and the smaller states, especially those which have emerged as such since the end of World War II.

Moreover, such a definition does not appear to the writer to be consistent with the following preceding statement of Dr. Pompe: <sup>46</sup>

As long as 'aggression' is not defined but only determined in casu, the difference in function between criminal and public law makes it necessary that a tribunal determines in every case, independently of possible previous decisions by a political organ, whether 'aggression' has been committed. This is, from a point of view of international criminal law, the significance of the much discussed question whether the definition of aggression is a political or a legal question. Insofar as 'aggression' has not been precisely defined it remains a predominantly political concept. When it was brought within the compass of criminal law the competent Tribunals had to determine in concreto whether culpable aggression had been committed.,

In a reference to the form of the Draft Code at the time of the publication of his work, Dr. Pompe stated:<sup>47</sup>

While the Code has a number of deficiencies, mainly from a systematic point of view, the absence of a strict definition of aggression is its main default and overthrows the whole structure of the Code in its present wording (emphasis added).

The writer poses the question: 'What is meant by a "strict" definition?' It is submitted that the connotation of the adjective is not consistent with the approach initially adopted by Dr. Pompe.

## CONCLUSIONS

Although the United Nations Organisation should be judged on its record of achievements, criticism would be unfair without recognition of the unprecedented difficulties which it has faced in forty three years. By its sponsorship of international treaties, conventions and declarations,<sup>48</sup> the U.N.O. has entrenched new concepts of human values in a world driven by conflicts between states. It has provided a forum for the public debate of issues which are international and transcend the interests of any individual state. It has not deviated from its fundamental purpose, as stated in Article 1 of its Charter, of pursuing the the maintenance of peace and security, but it has found the attainment of that purpose elusive. The reasons are not difficult to describe. In the wake of World War II, the development of strong and often intansigent political attitudes at international level, has made progress towards the fulfilment of the purposes of the U.N.O. slow, tortuous and often disappointing. Further, as Benjamin B. Ferencz pointed out in 1981, 'it would be unreasonable to expect 154 sovereign states in vastly different stages of economic, social and political development to make an easy or quick transition from the law of force to the force of law.'<sup>49</sup>

However, with the caveats stated above, the U.N.O. is no nearer today than it was in 1945 to reaching a solution of the politico-legal problems which are the aftermath of Nuremberg. Those problems include:



A mechanism for the quasi-enactment of binding canons of conduct in international relationships, expressed simply and unambiguously;

The inclusion in such a code of a precise statement of the nature and scope of 'crimes against peace' and an explicit expression of the concept of 'aggression';

The means whereby the proscriptions contained in an international law criminal code can be enforced with the same rigour as in national penal law.

It is the writer's view that the United Nations Organisation, which operates with a restricted Charter, is not the appropriate body to initiate or continue discussions with a view to evolving a solution of the problems to which reference has been made. The problems are neither solely political nor solely legal, but each of those elements is fundamental and overriding.

The United Nations Organisation shows no inclination to alter its methodology or procedures; it is using old-fashioned tools in its attempt to solve problems which are new in their intrinsic character, with nuclear warfare an ever-present threat. It is trite but accurate to repeat the observation often made that the Organisation needs more resolution and fewer resolutions. Moreover, with the International Law Commission the focal organ for recommendations to the General Assembly, the political, as distinct from the legal, complications are not likely to be resolved by such a body.

The consequence, it is submitted, is that the tool which has to be used to initiate and carry through the necessary discussions is statesmanship. The opportunity exists, in view of moderating Soviet attitudes, for the major Powers to create the catalyst for a standing forum outside the U.N.O. to identify the issues which need to be the subject of compromise and prepare an international agreement of binding force. Only if such statesmanship emerges is it likely that international criminal law will become a means of ensuring the peace and security of mankind.

As long ago as September 1982, the Secretary-General of the U.N.O., Perez de Cuellar, in a periodic report on the work of the Organisation, acknowledged the '... underlying deficiencies of our present system'. He stated:<sup>50</sup>

... the lesson is clear -- something must be done, and urgently, to strengthen our international institutions and to adopt new and imaginative approaches to the prevention and resolution of conflicts. Failure to do so will exacerbate precisely that sense of insecurity which, recently, cast its shadow over the second special session of the General Assembly devoted to disarmament. Despite present difficulties, it is imperative for the United Nations to dispel that sense of insecurity through joint and agreed action in the field of disarmament, especially nuclear disarmament.

The Secretary-General expressed the view that --

... we now take the Charter far less seriously than did its authors, living as they did in the wake of a world tragedy. I believe therefore that an important first step would be a conscious recommitment by Governments to the Charter.

It seems appropriate to conclude this chapter by quoting the final words of the Secretary-General in his report:

Member States will, I hope, understand if I end this report on a personal note. Last year I was appointed Secretary General of this Organization, which embodies the noblest hopes and aspirations of the peoples of the world and whose functions and aims under the Charter are certainly the important ever entrusted to an international institution. This year, time after time we have seen the Organization set aside or rebuffed, for this reason or for that, in situations in which it should, and could, have played an important and constructive role. I think this tendency is dangerous for the world community and

dangerous for the future. As one who has to play a highly public role in the Organization, I cannot disguise my deep anxiety at present trends, for I am absolutely convinced that the United Nations is indispensable in a world fraught with tension and peril. Institutions such as this are not built in a day. They require constant constructive work and fidelity to the principles on which they are based.

We take the United Nations seriously when we desperately need it. I would urge that we also seriously consider the practical ways in which it should develop its capacity and be used as an essential institution in a stormy and uncertain world.

## NOTES

1. History of U.N.W.C.C., p. 187 and footnote 1; General Assembly Resolution No. 95, Resolutions adopted by the General Assembly during the Second Part of its First Session from 23 October to 15 December 1946, Lake Success, 1947, p. 188. (Note: hereafter resolutions of the General Assembly of the United Nations Organisation are cited as 'G.A. Resolutions', followed by the relevant number and date). The Committee referred to in Resolution 95 on 11 December 1946 was established by Resolution 94 (1) of the same date. It was that Committee (sometimes referred to as the 'Committee of Seventeen') which recommended to the General Assembly the establishment of an international law commission and prepared provisions designed to serve as the basis for its statute (see Official Records of the General Assembly, Second Session, Sixth Committee, Annex 1).
2. See The Work of the International Law Commission, 3rd Edn., United Nations, New York, 1980, p. 4 (hereafter cited as 'I.L.C.')
3. Ibid., p. 4.
4. Ibid., p. 5.
5. See ibid., passim, and, by way of summary, the report of the I.L.C. on the work of its thirty-sixth session, 7 May - 27 July 1984, G.A., Official Records, thirty-ninth session, Supplement No. 10 (A/39/10).
6. G . A . Resolution 3314 (XXIX), 14 December 1974 .
7. G.A. Resolution 2330 (XXII), 18 December 1967.
8. G.A. Resolution 3105 (XXVIII), 12 December 1973.
9. For details of the deliberations within the U.N.O. leading to the adoption of the definition of 'aggression', see Yearbook of the United Nations, 1974, pp. 840-842.
10. See Rahmatullah Khan, Professor of International Law, Jawaharlal Nehru University, New Delhi, Indian Journal of International law, (the official organ of the Indian Society of International Law) 1979 vol. 19, pp. 552-559.
11. See Frowein, E.P.I.L., vol. 5, p. 272, at pp. 275--276.
12. Judgment of Judge Klaestad, of the International Court of Justice, in the South-West Africa Voting Procedure case, (1955) 16 I.C.J. Reports, p. 88. However, in the same case Judge Lauterpacht said: 'Although there is no automatic obligation to accept fully a particular recommendation or series of recommendations, there is a legal obligation to act in good faith in accordance with the principles of the Charter and the System of Trusteeship'. (emphasis added). In the writer's view that opinion could not validly be applied in respect of a matter involving public international criminal law.
13. See the Proceedings of the American Society of International Law at its 73rd annual meeting at Washington, D.C., 26-28 April, 1979. The Proceedings record that in a discussion which followed the delivery of a contribution by Professor O.M. Garibaldi, of Harvard Law School, it was stated (p. 331): The suggestion was also put forth that this [the U.N.O.] was an international society of sovereign States, acting on the basis of individual military power. What was lacking, obviously, was a mechanism to enforce legal norms. There was the International Law Commission, but it had had less than effective impact in codifying the law. States had repeatedly demonstrated their opposition to codify crimes under international law, whether they were forms of apartheid, genocide or aggression. This could be seen in the reluctant national attitudes expressed toward the Draft Code of Offences Against the Peace and Security of Mankind. The present reality was that we were living in a world of power politics, a world wherein nations were not prepared to surrender even a minute portion of their sovereignty in order to create a

rational world order. As long as this was the situation, there would be no norms without uniform agreement and legal consultation'. The report of the discussion concluded: 'The wide spread attitude of many States in the United Nations, especially those in the West, was: "So what? It is only a recommendatory resolution of the United Nations, so what does it matter? Why should we offend our friends in the Third World by voting against it?"' In the light of the expression of such views, to arrive at a conclusion that would hold such resolutions as binding or law-creating would be at best questionable, and in my view is not tenable.

14. See Benjamin B. Ferencz, E.P.I.L., vol. 3, p. 1.
15. As Ferencz points out, ibid., p. 5: 'Several States questioned the wisdom of allowing those States which were most likely to commit aggression to determine whether it had occurred. Ecuador suggested that an international penal tribunal should be given that responsibility'.
16. Idem.
17. Idem.
18. Idem.
19. Idem.
20. For a statement of the views of Ferencz as to the current significance of the definition, see ibid., p. 6.
21. G.A. document A/36/535, 16 October 1981. The author of the 100 page paper was Mr. L. Lukasik, of the U.N.O. legal staff, with whom I had personal discussions in New York on 20 January 1983. At that time he was pessimistic about the prospects of any significant progress towards the formulation of a Draft Code.
22. Ibid., paras. 98-123 with reference to the draft as a whole. In paragraph 106 it was stated: 'Many States pointed out that the Code was prepared in 1954 and therefore it could not be considered as reflecting the present-day realities and that regardless of its being "a quarter of a century old", as the representative of Bulgaria put it. it had at the outset certain shortcomings'.
23. Ibid., p. 23.
24. Ibid., p. 24.
25. G.A. Resolution 36/106, 10 December 1981, Official Records of the General Assembly, Thirty-Sixth Session, Supplement No. 46 (A/36/46).
26. G.A. A/CN.4/364.
27. Ibid., p. 24,
28. Ibid., p. 3.
29. For details, see History of U.N.W.C.C., pp. 442-450.
30. Bassiouni, International Criminal Law: A Draft International Criminal Code, Sijthoff and Noordhoff, The Netherlands, 1980.
31. Ibid., p. 54.
32. Idem.

33. See Bassiouni and Nanda, A Treatise on International Criminal Law, vol. 1, Crimes and Punishment, preface, pp. xi and xii.
34. For a review of Bassiouni's work by L.C. Green, University of Alberta, see (1982) 76 A.J.I.L., No. 3, July.
35. The three major works by Ferencz, all of two volumes are Defining International Aggression: The Search for World Peace (1975), An International Criminal Court : A Step toward World Peace (1980) and Enforcing International Law : A Way to World Peace (1983), all published by Oceana Publications Inc., New York. Ferencz practising New York attorney, writes against a background of having been a member of the prosecution staff and counsel in trials in Nuremberg. He is the author of a widely praised book detailing the story of Jewish forced labor in Nazi Germany and occupied countries. He played a significant part in obtaining some reparations from German industrialists for victims of the German forced labor policies, details of which he revealed in his work 'Less than Slaves', Harvard University Press, Cambridge, Massachusetts, 1979. In a private discussion with the writer in New York in January 1983, Mr. Ferencz maintained his optimistic views that eventually the United Nations Organisation will achieve the goals directed at world peace which it has pursued since its inception in 1945.
36. See Note 35, supra.
37. Brownlie, International Law and the Use of Force by States, Clarendon Press, Oxford, 1963.
38. Ibid., p. 357.
39. Stone, Legal Controls of International Conflict, Maitland Publications Pty. Ltd., Sydney, 1954. It is noted in Tutorow, op cit., p. 69 that a second edition was published in 1959.
40. Ibid., p. 334.
41. Woetzel, The Nuremberg Trials in International Law, Stevens & Sons Limited, London, 1962, pp. 232-242.
42. Ibid., p. 238.
43. The Times, London, 2 August 1951.
44. Pompe, Agressive War an International Crime, Martinus Nijhoff, The Hague, 1953.
45. Ibid., p. 113.
46. Ibid., p. 70.
47. Ibid., p. 353.
48. For example, the 1948 Genocide Convention, the 1948 Universal Declaration on Human Rights (there are seven specific references to human rights and fundamental freedoms in the U.N. Charter) and the 1969 Vienna Convention on the Law of Treaties, which came in force in 1980.
49. (1981) 75 A.J.I.L. 674, p. 678.
50. United Nations document, Report of the Secretary-General on the Work of the Organization, New York, 7 September 1982.

## APPENDIX 1.

## DEFINITION OF AGGRESSION

The General Assembly.

Basing itself on the fact that one of the fundamental purposes of the United Nations is to maintain international peace and security and to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace,

Recalling that the Security Council, in accordance with Article 39 of the Charter of the United Nations, shall determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security,

Recalling also the duty of States under the Charter to settle their international disputes by peaceful means in order not to endanger international peace, security and justice,

Bearing in mind that nothing in this Definition shall be interpreted as in any way affecting the scope of the provisions of the Charter with respect to the functions and powers of the organs of the United Nations,

Considering also that, since aggression is the most serious and dangerous form of the illegal use of force, being fraught, in the conditions created by the existence of all types of weapons of mass destruction, with the possible threat of a world conflict and all its catastrophic consequences, aggression should be defined at the present stage,

Reaffirming the duty of States not to use armed force to deprive peoples of their right to self-determination, freedom and independence or to disrupt territorial integrity,

Reaffirming also that the territory of a State shall not be violated by being the object, even temporarily, of military occupation or of other measures of force taken by another State in contravention of the Charter and that it shall not be the object of acquisition by another State resulting from such measures or the threat thereof,

Reaffirming also the provisions of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,

Convinced that the adoption of a definition of aggression ought to have the effect of deterring a potential aggressor, would simplify the determination of acts of aggression and the implementation of measures to suppress them and would also facilitate the protection of the rights and lawful interests of, and the rendering of assistance to, the victim,

Believing that, although the question whether an act of aggression has been committed must be considered in the light of all the circumstances of each particular case, it is nevertheless desirable to formulate basic principles as guidance for such determination,

Adopts the following Definition of Aggression:

Article 1

Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition.

Explanatory note: In this Definition the term "State":

- (a) Is used without prejudice to questions of recognition or to whether a State is a Member of the United Nations;
- (b) Includes the concept of a "group of States" where appropriate.

### Article 2

The first use of armed force by a State in contravention of the Charter shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.

### Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

- (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
- (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
- (c) The blockade of the ports or coasts of a State by the armed forces of another State;
- (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
- (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
- (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
- (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

### Article 4

The acts enumerated above are not exhaustive and the Security Council may determine that other acts constitute aggression under the provisions of the Charter.

### Article 5

1. No consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.
2. A war of aggression is a crime against international peace. Aggression gives rise to international responsibility.
3. No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful.

Article 6

Nothing in this definition shall be construed as in any way enlarging or diminishing the scope of the Charter, including its provisions concerning cases in which the use of force is lawful.

Article 7

Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support, in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

Article 8

In their interpretation and application the above provisions are interrelated and each provision should be construed in the context of the other provisions.



## CHAPTER 17 THE CONCURRENCE AND THE DISSENT

### INTRODUCTION

Before World War II ended, public controversy began concerning the forthcoming trials of German war criminals in accordance with the declarations of the Allied and Associated Powers. The controversy continued during and after the trials at Nuremberg before the International Military Tribunal and it is still evident at the present time.

Jurists of international reputation, academic specialists, scholars, historians and many others have found in the 'Nuremberg principles' a fertile source of disputation as to the legal validity of the whole process. The disparate views cover a wide range of the essential aspects of "Nuremberg Law". They are summed up in the Introduction to Tutorow's modern, annotated bibliography and source book (1986) in these terms:<sup>1</sup>

Much has been written on the justice and injustice of the various war crimes trials. Some critics have defended the need for such trials, but would have preferred tribunals consisting of members of neutral and vanquished nations as well as victors. Others deny the right of any nation to try soldiers or the industrial and political leaders of a defeated nation for the violation of what amounts to ex post facto or non-existent laws, and they argue further that no laws defining war crimes existed until after World War II ... Staunch defenders of Allied trials could point to the farcical post-World War I Leipzig trials that resulted from allowing the trial of war criminals by domestic courts in Germany.

This chapter contains brief resume's of the writings of well-known jurists, academics and lawyers, some of whom have affirmed, and others of whom have dissented from, the validity of 'Nuremberg Law'. Of necessity, the views of only a very small number on each side of the debate could be included in the chapter. It has not been considered appropriate, except in isolated cases, to include subsequent comment by those who appeared as individual counsel at Nuremberg, either for the prosecution or defence, or by individual members of the Tribunal (as distinct from the judgment of the Tribunal). The choice has been governed by both the reputation of the writers selected and by the desirability of referring to as many of the major areas of disputation as is practicable.

In order to avoid repetition of the writer's statement of personal views in Chapter 18, no attempt has been made in this chapter to appraise the opinions expressed.

In a consideration of the opposing views which have been publicly advanced concerning the validity, as a matter of international law, of the London agreement and Charter, it should be appreciated that for the most part they reflect the opinions of academic lawyers. Of course, many of those were eminent. Nevertheless there is a comparative dearth of material published by practising jurists and lawyers. The uneven distribution was necessarily resulted in the citation in this Chapter of a preponderance of references to the writings of academic specialists and a concentration on theoretical issues. However, to the extent to which the debate concerning 'Nuremberg Law' has involved theoretical issues, examples of both concurrence and dissent illustrate the uneven distribution.

### SECTION A - THE CONCURRENCE

#### Oppenheim's International Law (7th edn., ed. Lauterpacht)

In the following statement of some of the essential views of Sir Hersch Lauterpacht, account has primarily been taken of the 7th edition of Oppenheim's International Law, vol. II, Disputes, War and Neutrality, 1952, as edited and substantially rewritten (with at times radical revision compared with the 6th edition (1944)) by Professor Lauterpacht.<sup>2</sup>

In the 7th edition of the cited work, it is stated with reference to the 1928 Pact of Paris:

The essence of a criminal act, as distinguished from a contractual or tortious wrong actionable at the instance of the injured party, is the fact that it injures, and is punishable by, the community at large. Nor are the seriousness, the destructiveness, and the heinousness of the act irrelevant to the question of the determination of its criminal character. Judged by these tests, the premeditated violation of the Pact of Paris constitutes an international crime. It is no longer a question of aggressive war in general, i.e. a war undertaken in violation of an express undertaking. It is a question of a war undertaken in breach of a fundamental treaty which has dethroned war as an international prerogative of the sovereign State.<sup>3</sup>

....

It may not be easy to define the exact nature of the binding force, in the sphere of conventional International Law, of the Charter of the International Military Tribunal upon the States which signed it without formally accepting any obligations *inter se*, which adhered to it, or which participated in its affirmation by the General Assembly [of the United Nations Organisation]. However, International Law is not created by treaty alone. In so far as the instruments referred to above give expression to the views of the States concerned as to the applicable principles of International Law—applicable generally and not only as against the defeated enemies—they may be fairly treated as evidence of International Law and as binding upon them. In comparison the detailed formulation of these principles, however useful, must be deemed to be of secondary importance.<sup>4</sup>

In particular, Professor Lauterpacht expressly negated the proposition that 'the conferment of jurisdiction on the Nuremberg Tribunal with regard to crimes against the peace constituted an innovation in international law (i.e. the question whether recourse to aggressive war is criminal or merely unlawful)'.<sup>4a</sup>

### Lord Wright

Aided in reputation by his judicial eminence and the knowledge and experience gained as Chairman of the United Nations War Crimes Commission, Lord Wright was probably the foremost advocate in Britain of the legal validity and propriety of the London Agreement and Charter and of the subsequent Nuremberg Trial.

Lord Wright first publicly expressed his views as a jurist in an article in January 1946, some eight months before the Nuremberg Tribunal delivered its judgment.<sup>5</sup> He asserted that the crimes charged in Counts 2, 3 and 4 of the indictment:

... are not crimes because of the agreement of the four Governments, but that the Governments have scheduled them as coming under the jurisdiction of the Tribunal because they are already crimes by existing law. On any other assumption the Court would not be a Court of law but a manifestation of power. The principles which are declared in the Agreement are not laid down as an arbitrary direction to the Court but are intended to define, and do, in my opinion, accurately define what is the existing International Law on those matters.

In the cited article, Lord Wright developed powerful arguments in support of the acceptance of the concept of crimes against peace (Count 2) as being contrary to the law of nations and criminal in essence. He put the argument on two bases: first, that the war was planned and totalitarian in character: second, that a war of aggression is beyond any justification by reason of necessity or self defence and that its initiation is 'the accumulated evil of the whole'. Therefore he concluded that the planning, preparation, initiation or waging of war of aggression was a crime against peace.

Lord Wright recognised that the 'punishment of heads or other members of Governments or national leaders for complicity in the planning and initiating of aggressive or unjust war has not yet been enforced by a Court as a matter of International Law'. In this respect his primary argument was derived from the 1928 Pact of Paris. Thus:

The concert of the nations evidenced by the Pact had the sanction of being embodied in a Treaty, the most formal testimony to its binding force. As a treaty or agreement it only bound the nations which were party to it. But it may be regarded from a different aspect. It is evidence of the acceptance by the civilized nations of the principle that war is an illegal thing. This principle so accepted and evidenced, is entitled to rank as a rule of International Law. It may be that before the Pact the principle was simply a rule of morality, a rule of natural as contrasted

with positive law. The Pact, which is clear and specific, converts the moral rule into a positive rule comparable to the laws and customs of war, and like these laws and customs binding on individuals since the principle that individuals may be penally liable for particular breaches of International Law is now generally accepted.

The thesis expounded in the cited article was consistently and vigorously asserted by Lord Wright at meetings of the United Nations War Crimes Commission and in its principal publication, History of U.N.W.C.C.<sup>6</sup> (See the Introductory Chapter, the author of which was Lord Wright).

.....

#### Mr Henry L. Stimson

Very few national political leaders engaged in public discussion of 'Nuremberg Law' after the International Military Tribunal delivered its judgment and the United Nations Organisation formally endorsed the principles which it propounded.

An exception was Mr. Henry L. Stimson, who described the trial as 'a landmark in the history of international law'.<sup>7</sup> As a former Secretary of War of the United States, Mr. Stimson had emerged as the principal political proponent of the concept of a formal trial, by an international tribunal, of major German war criminals.<sup>8</sup> Despite the strong criticism which his views attracted, he remained a respected figure in American politics.<sup>9</sup>

In the cited article, published in 1947, Mr. Stimson maintained his approach to the Nuremberg proceedings which he had advocated for some years: that is, justification of the London Agreement and Charter of 8 August 1945 and of the Nuremberg Judgment on a combination of moral philosophy and legal principles. He said:<sup>10</sup>

International law is not a body of authoritative codes or statutes; it is the gradual expression, case by case, of the moral judgments of the civilized world. As such, it corresponds precisely to the common law of Anglo-American tradition. We can understand the law of Nuremberg only if we see it for what it is—a great new case in the book of international law, and not a formal enforcement of codified statutes.

Mr. Stimson made the Pact of Paris of 1928 the cornerstone of his argument. In this respect, after a discussion of international developments between 1918 and 1945, he said:<sup>11</sup>

... the second World War brought it home to us that our repugnance to aggressive war was incomplete without a judgment of its leaders. What we had called a crime demanded punishment; what our law in balance with the universal moral judgment of mankind. The wickedness of aggression must be punished by a trial and judgment. This is what has been done at Nuremberg.

Now this is a new judicial process, but it is not ex post facto law.

Mr. Stimson argued that the legal basis of 'Nuremberg Law' was by analogy to the development of the common law:<sup>12</sup>

All case law grows by new decisions, and where those new decisions match the conscience of the community, they are law as truly as the law of murder. They do not become ex post facto law merely because until the first decision and punishment comes, a man's only warning that he offends is in the general sense and feeling of his fellow men.

The charge of aggressive war is unsound, therefore, only if the community of nations did not believe in 1939 that aggressive war was an offense. Merely to make such a suggestion, however, is to discard it. Aggression is an offense, and we all know it; we have known it for a generation. It is an offense so deep and heinous that we

cannot endure its repetition.

The law made effective by the trial at Nuremberg is righteous law long overdue. It is in just such cases as this one that the law becomes more nearly what Mr. Justice Holmes called it: 'the witness and external deposit of our moral life'.

Mr. Stimson's stature was recognised by the International Military Tribunal in its Judgment (pages 39-40), in which it referred to his statement in 1932: 'War between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout practically the entire world ... an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law ... We denounce them as law breakers'.

### Academic views

In this section, reference is made to the opinions of a number of academic international lawyers, all of whom have written extensively on 'Nuremberg Law'.

Professor R.K. Woetzel, writing in 1961 as Professor at New York and Fordham Universities, examined a number of criticisms of the assumption of jurisdiction in the London Agreement and Charter.<sup>13</sup> They included the breach of the so-called territoriality principle (the *lex loci* theory), the now discredited 'Acts of, State' doctrine and the claim that after 8 May 1945 the status of the Allied Powers in Germany was that of belligerent occupation and their right to prosecute war criminals was restricted by Article 43 of the Hague Rules of Land Warfare. Another criticism discussed by Professor Woetzel related to the general character and the composition of the Tribunal. Professor Woetzel's conclusions were:

... it must be concluded that the I.M.T. at Nuremberg was an international military tribunal with a firm basis in international law. It had a definite right to take jurisdiction over the German war leaders ... It is evident ... that international sanction constitutes the most important condition for the legal character and the legal basis of the Nuremberg trial. With it, the I.M.T. can certainly be regarded as an institution sanctioned under international law.

In a survey of major legal developments in the period 1920 to 1945 relating to illegal war, aggressive war and aggression, Professor I. Brownlie placed primary emphasis on the Pact of Paris. He regarded the following recitals in the preamble as of 'material interest':<sup>14</sup>

(The High Contracting Parties) Persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty.

Professor Brownlie continued: <sup>15</sup>

This instrument has been ratified or adhered to by sixty three states and is still in force. It contains no provision for renunciation or lapse. In order to bring the Pact into force between the countries of Eastern Europe, a Protocol with this object was signed at Moscow on 9 February 1929 by the U.S.S.R., Estonia, Latvia, Poland and Rumania. The treaty was of almost universal obligation since only four states in international society as it existed before the Second World War were not bound by its provision [Bolivia, El Salvador, Uruguay and Argentina].

Nor did the treaty remain in isolation. It had considerable effects on state practice. In the years that followed numerous treaties were concluded which reaffirmed the obligations of the Kellogg-Briand Pact and stated as one of their objects the desire to give more precision to those obligations. In the deliberations and public pronouncements of statesmen the Pact was treated as a factor in international affairs which was to be taken into

account.

In the light of this defence of the legal significance of the Pact of Paris in establishing a positive tenet of recognised international law at the time of Nuremberg, Professor Brownlie categorically concluded:<sup>16</sup>

The Kellogg-Briand Pact provided a legal basis for the charges of crimes against peace contemplated at the London Conference on Military Trials and incorporated in the Charters of the International Military Tribunals at Nuremberg and Tokyo; and received emphasis in the examination of the law of the Charter undertaken by the Tribunal at Nuremberg.

... [The Pact] at present stands together with the United Nations Charter as one of the two major sources of the norm limiting resort to force by states. It is parallel to and a complement of the Charter.<sup>17</sup>

In a monumental treatise on what the author described as the dynamics of disputes and war-law, published in 1954, Professor Julius Stone acknowledged that: 'as matters stood prior to vigorous development during and after the Second World War, rules of customary international Law (as distinct from particular treaties) did not directly establish or punish the criminality of individuals for breaches of the law of war'.<sup>18</sup> He further recognised that: 'the question of criminal sanctions against enemy individuals under international law itself emerged fully into controversy during the Second World War ... the openness of the Nazi leaders' aggressive intentions raised with new acuteness the question of responsibility for the infliction of the scourge of war on most of mankind.'<sup>19</sup>

Professor Stone expressed his view simply and directly in the following passage of the cited work:

In the final resort, the trials, convictions and punishments under all the counts of the Nuremberg Charter have a technically sound legal basis in the powers of the victor States over the defeated German State and its soldiers, ministers and nationals, that State having unconditionally surrendered, and as to the count for violations of war-law stricto sensu, it was also legally well based on the traditional right of each belligerent to try violators, regardless of nationality, in its own tribunals.<sup>20</sup>

Having acknowledged that the two principal objections which had been made to the Nuremberg proceedings were that they violated the maxim nulla poena sine lege and deprived the accused of the defence of the plea of superior orders, Professor Stone forthrightly stated:

Even if it were assumed that there was a rule of international law which forbade retroactive criminal punishment in accordance with the maxim, then the question whether the Nuremberg trials contravened it would still have to be answered separately for each count. There is, however, no such rule of international law. Even municipal systems of law do not invariably have such a rule of law: the United Kingdom, for example, has no such rule, however strong may be the policy observed by its courts in the interpretation of criminal statutes. The question of general retroactivity of the Nuremberg counts must be regarded, therefore, as a question of substantial justice and policy, and not of law in the strict sense. The injustice involved is that of arbitrary changes in the legal consequences of men's acts after the acts occur, and in particular the punishment of acts the guilt of which the actor could not have known at the moment of commission.<sup>21</sup>

In Professor Stone's view it was the count of crimes against the peace which was nearest to a violation of the substantial policy against retroactivity. In this respect he stated:

There was clearly no explicit rule of international law, or indeed of municipal law as at 1939, providing punishment for statesmen or military leaders who led their nations into aggressive war. Yet in terms of substantial policy ... the position is not so clear. For, since rules of treaty law did then exist which made illegal the kind of war planned and initiated by the defendants, it can scarcely be said that they were being punished for acts the guilt of which they could not have known when they committed them. The argument that there was no advance prescription of punishment is scarcely an argument of moral merit, in view of the serious nature of the

illegality. Still less can the principle of substantial justice underlying the policy against retroactivity be regarded as violated by the counts for war crimes stricto sensu, and for crimes against humanity.<sup>22</sup>

In a separate discourse on the maxim nulla poena sine lege, Professor Stone considered the analogy between the development of customary rules of international law and the growth of the common law. He said:

... the development of the criminal and other branches of law by precedent in common law systems necessarily involves the holding criminal of acts not clearly such when done. The maxim can scarcely be given legal force except by exhaustive authoritative advance statement of the criminal law, and the prohibition of judicial 'interpretation' thereafter. In those regards, international law resembles an uncodified common law system. ... The Nuremberg trials now add an important judicial contribution to the pre-existing evidence of the growth by custom of an international criminal law.<sup>23</sup> (emphasis added)

The views of Professor H-H Jescheck, of West Germany, have been included in this section of this chapter because of the scholarly and balanced manner in which he has presented them over the decades, against the background of his service in the Wehrmacht during World War II.

Writing in the Encyclopedia of Public International Law in 1982, Professor Jescheck said:

The [Nuremberg] Tribunal conceived itself to be a duly constituted international court; in reality it was an interAllied occupation court, since Germany had not agreed to the creation of such an international entity.<sup>24</sup>

In respect of the twelve wars of aggression alleged in the indictment to have been waged by the German Reich, Professor Jescheck's comment was:

Although at that time no definition for the international law concept of aggression existed, it must be conceded that, in almost all of the above cases, they were wars of aggression under any thinkable concept.<sup>25</sup>

Professor Jescheck expressed the view that the resolution of affirmation by the United Nations General Assembly on 11 December 1945 had the effect of 'mere approval of action taken by the Allied Powers against the former German leadership as the just and appropriate (under the circumstances) application of criminal law by the victors against the vanquished.'<sup>26</sup>

The conclusion of Professor Jescheck in the cited article was:

If a situation similar to that following World War II arises and war crimes trials are conducted again, authority would undoubtedly be sought primarily in the Nuremberg Judgments. The Nuremberg courts decided of necessity many questions of law which are still debated; for that reason, their judgment roused ample criticism from all sides. It would, nevertheless, be unjust and beside the point to dismiss them as an expression of political bias or revenge. It is a milestone in the development of international law that such grave crimes as occurred in World War II were punished in 13 court judgments following trials in which the accused enjoyed the full right to a defence. Even though many crimes committed on the Allied side remained unatoned for and in some cases unjust sentences were pronounced as a result of human shortcomings, the example of Nuremberg is a landmark in the law when viewed as a whole. One only regrets that it has not been followed. The trials are slowly fading from memory and are thus losing their imperative force as precedents.<sup>27</sup>

...

In a lecture delivered before the Edinburgh University Law Faculty Society on 5 February, 1946, during the progress of the principal Nuremberg trial, Professor A.L. Goodhart, then Professor of Jurisprudence in the University of Oxford and editor of the Law Quarterly Review,<sup>28</sup> asserted three essential elements in every legal trial: the judge, the law and the evidence. He examined the extent to which it could be said that those essential elements could be found in the International Military

Tribunal trial.

Professor Goodhart rejected the argument that the members of the I.M.T., because they were representatives of the victorious Allied Powers, lacked 'that impartiality which is an essential in all judicial procedure'. Such an argument, he said, 'ignores the fact that it runs counter to the administration of law in every country.' He postulated three grounds upon which the Tribunal satisfied the essential element of fairness. First, the character of the judges; second, the fact that 'the trials are being conducted in the full glare of world publicity'; and third, the requirement in Article 26 of the London Charter that the Tribunal state the reasons on which its judgment as to the guilt or innocence of any defendant was based. His conclusion was that the first essential of a legal trial was satisfied.<sup>29</sup>

Without examining any of the detailed questions of evidence and procedure which arose at the trial, and basing his argument on the provisions of the Charter, including the authority of the Tribunal, under Article 13 of the Charter, to prescribe rules for its procedure, Professor Goodhart stated:

It is clear ... that no question can ever be raised concerning the fairness of the rules of evidence and procedure administered the Nuremberg Tribunal. The second essential of a legal trial has therefore been satisfied.<sup>30</sup>

Professor Goodhart examined two 'major questions' in determining the legal, as distinct from the political, justification for the I.M.T.: 'a) To what extent is the law in the Charter *ex post facto* in character? (b) In so far as it is *ex post facto* can this departure from principle be justified?' He rejected Professor Oppenheim's view that international law could be applicable only to States and never to individuals:

The correct conclusion ... is, I believe, that under International Law an individual can be under a legal duty not to commit certain international crimes, such as, for example, piracy or violations of the Hague and Geneva conventions. The fact that in the past there have been no international courts before which such crimes could be prosecuted does not negative the existence of such duties; it merely shows that the then existing machinery was defective. The creation of the International Military Tribunal has remedied this defect.<sup>31</sup>

Professor Goodhart acknowledged that it was still necessary to consider whether the crimes charged constituted crimes under international law at the time when they were allegedly committed. Basing his conclusion on historical developments culminating in the 1928 Pact of Paris, Professor Goodhart said:

... the Nuremberg trials differ from all previous war trials because hitherto defendants have only been charged with crimes either committed by themselves or under their immediate directions. Never before has cold calculated brutality played a leading role in military strategy. This does not mean that there has been an innovation in the law, for all that has happened is that the law has been applied to novel circumstances. As Lord Jowitt, L.C. has said in the *Joyce* case:<sup>32</sup> 'It is not an extension of a penal law to apply its principle to circumstances unforeseen at the time of its enactment, so long as the case is fairly brought within its language.' There can therefore be no question that Count Three is in accord with the established principles of International Law.

It was only in relation to Count 4 ('crimes against humanity') that Professor Goodhart had any reservation. Nevertheless, while conceding that Count 4 was, in a sense, *ex post facto* in character, he argued that to allow the perpetrator of such acts to get off scot-free because at the time when they were committed no adequate legal provision for dealing with them had been devised, is to turn what is a reasonable principle of justice in fully developed legal systems into an inflexible rule which would, in these circumstances, be in direct conflict with the very idea of justice on which it itself is based.'

The conclusion of Professor Goodhart was that the first three counts were in accord not only with the charter of the International Military Tribunal but also with the existing international law, 'while the fourth count, although based on a novel international principle, was in accord with the principles found in every civilised system of law.'

One of the most distinguished American international law scholars at the time of the I.M.T. trials was Professor Quincy Wright, of the University of Chicago. He had been, and continued to be, a prolific writer on the problems involved in 'Nuremberg Law'. He was one of a number of assistants to the American representatives on the Tribunal.

As the end of World War II approached, Professor Wright wrote a monograph in which he discussed the legal principles relating to the punishment of war criminals.<sup>33</sup> His conclusion was that four systems of law — national law, the law of war, the law of peace and 'world law' — could be used to punish war criminals and that each basis of prosecution had some advantages and some disadvantages. However, he considered the fourth system, that is 'world law' was to be preferred. By 'world law' he conveyed the concept of what he also termed 'universal law', which he compared with the older theory of piracy *jure gentium*. In anticipation, to a substantial degree, of the method of prosecution for which the London Agreement and Charter provided, Professor Wright stated:

Prosecutions under universal law would have the disadvantage from the juridical point of resting upon a controversial legal foundation. Such trials would look towards the future rather than the immediate past but it is believed that sufficient legal materials exist to nullify the suggestion that they would rest upon *ex post facto* law. Such trials would be the most satisfactory in reaching all the war criminals, in vindicating the rule of law, in deterring future war crimes, in satisfying demands for retribution, and in preventing further danger from the war criminals. Such trials would assert that the community of nations, which the Dumbarton Oaks Proposals seek to organize, already exists, and would demonstrate by acts louder than words that human rights can be vindicated and inhuman offenses can be punished. Without widespread convictions on these matters, sustained by firmer evidence than the contracts of governments, the general organization for peace and security is not likely to flourish.

In a subsequent article,<sup>34</sup> Professor Wright expanded the expression of his views in the light of the judgment of the I.M.T. and the opinion of 'champions and critics' of the Nuremberg proceedings. In response to the criticism that the I.M.T. had no jurisdiction in international law and that it applied *ex post facto* law, he said :

Legally belligerent states have habitually assumed jurisdiction to try in their own military commissions captured enemy persons accused of war crimes and to try in their own prize courts captured enemy and neutral vessels. All states in time of peace have assumed jurisdiction to try captured pirates in their own criminal courts and some states have extended the jurisdiction of such courts to other offense against the law of nations committed by aliens abroad. ... In practice the legal competence of national criminal, military, and prize courts to try aliens for certain offenses against the law of nations committed outside the state's territory has not been questioned ... Sovereign states, it is true, cannot be subjected to a foreign jurisdiction without their consent, but no such principle applies to individuals. The Nuremberg Tribunal did not exercise jurisdiction over Germany but over certain German individuals accused of crimes.<sup>35</sup>

Professor Wright rejected as irrelevant what he termed the equitable principle of 'clean hands':

Whether or not statesmen or individuals of the United Nations have been guilty of any of the offenses for which the defendants were tried was not a question legally relevant to this trial: nor is it legally relevant to consider whether other persons who have not been indicted or who were not within the jurisdiction of the Tribunal may have been guilty of the same offences. Unreasonable discrimination in initiating prosecution of persons probably liable under law would certainly not appear to be just and when the law applied is international law justice seems to call for a tribunal with jurisdiction over all persons subject to that law. Such justice, however, has never been realized. Courts applying international law have always had a more limited jurisdiction. It has not been considered unreasonable for the jurisdiction of national tribunals applying international criminal law to be limited to those whose acts were injurious to the state establishing the tribunal.<sup>36</sup>

In a comment on the I.M.T. 's judgment that 'The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered' and 'The Signatory Powers . . . have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law', Professor Wright said:

This statement suggests two distinct grounds of jurisdiction— that enjoyed by the four powers as the government of Germany and that enjoyed by any state to administer law. The latter statement is far from complete. International law does not permit states to administer criminal law over any defendant for any act. There are limits to the criminal jurisdiction of a state. Every state does, however, have authority to set up special courts to try any person within its custody who commits war crimes, at least if such offenses threaten its security. It is believed that this jurisdiction is broad enough to cover the jurisdiction given by the Charter. If each party to the



Charter could exercise such jurisdiction individually, they can agree to set up an international tribunal to exercise the jurisdiction jointly. The context of the Court's statement suggests that the Tribunal intended this limitation.<sup>37</sup>

Professor Wright acknowledged that disagreement continued concerning the scope of the concept of offences against the law of nations. However, his view was that an analysis of general principles of international law and of criminal law suggested the following definition 'A crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state'.<sup>38</sup>

On the basic issue of the legal competence of the four principal Allied Powers to enact the terms of the Charter of the I.M.T., especially paragraph 6(a) of the Charter, Professor Wright expressed the view that 'there can be little doubt that international law had designated as crimes the acts so specified in the Charter long before the acts charged against the defendants were committed'.<sup>39</sup>

It should be noted that in relation to the conspiracy charge, Professor Wright confined his analysis to the interpretation of the Tribunal. He did not criticise the inclusion of conspiracy in Count 1 of the indictment, either generally or, in particular, in respect of its juxtaposition to charges of actually committing the crimes contemplated by the alleged conspiracy.

Professor Wright, who had been personally involved at a high level as an adviser to the American judges at Nuremberg, concluded in these terms. The world shattered by two world wars needs to have its confidence in law restored. Such confidence can only develop if people believe that formal law embodies justice and that it will be enforced. The Nuremberg trial is likely to contribute to both of these ends. The general opinion that aggressive war and mass massacre are crimes has been recognized in formal international law and that law has been sanctioned by trial and punishment of many of the guilty. Much remains to be done but opinion will be reassured that international law is neither esoteric nor helpless.<sup>40</sup>

In one of the most logical and incisive answers to the critics of 'Nuremberg Law', Professor Wright, in a subsequent article,<sup>41</sup> debunked the assumptions of positivistic jurists at the time of the Nuremberg trials. He began his criticism of positivistic doctrine as applied to the London Charter by the following categorical statement:

The favourite or unfavourable character of comments upon events related to international law often depends less upon the nature of the events than upon the theory of international law assumed by the commentator.

... Positivism tends to assume that the sovereign state is the only subject of international law; that it is under no obligation except those which it has accepted by valid agreement or clear acquiescence in a general custom; that such obligations are to be narrowly construed under the assumption that consent to qualifications of sovereignty cannot be assumed; and that consequently concrete obligations cannot be implied even from formal consent to general principles.<sup>42</sup>

Professor Wright continued his trenchant criticism of positivistic doctrine when he said:

If it is said that the positivistic conceptions of international law express the reality of the present situation, it may be answered that the reality of a legal situation is in no small measure the product of the prevailing opinion about the nature of law. If general opinion throughout the world presumes that sovereign states are under no obligations except those they have explicitly accepted, then international relations will be little affected by a sense of legal obligation. It is for this reason that periods of jural positivism have been periods of jural pessimism, in which men see little hope of improvement through the law. Unless men believe in justice and the possibility of realizing it through law, there is not likely to be much either of justice or of law.<sup>43</sup>

Professor Wright concluded by stating:

The Nuremberg Tribunal, in characterizing Germany's hostilities as aggression, manifested more than the prejudice of the victors. It manifested the overwhelming opinion of the world. In the last analysis, no better criterion can

be found for interpreting the justice and the legal effect of acts of state.

The predominant opinion of the legal community must be the ultimate source of justice, at least if the thesis of democracy is accepted. In a world of transition, positivistic theories which hamper the adaptation of international law to international justice, as thus evidenced, can only bring law into contempt and promote a lawless struggle for survival.<sup>44</sup>

Writing in September 1944, Professor Sheldon Glueck, Professor of Criminal Law and Criminology, Harvard University,<sup>45</sup> adopted a positive and incisive attitude towards the punishment of Axis major war criminals. In many respects he foreshadowed the policies adopted in the London Agreement and Charter. His thesis was that 'Punishment of individual malefactors remains as the only deterrent and retributive remedy ... it is recourse against individual war criminals upon which the United Nations ought largely to rely'.

Professor Glueck argued:

Because of the widespread murders and lootings of innocent civilians initiated by Germany in supplementing traditional warfare with ordinary crime as a politico-military policy, Germany and her satellites have given a new meaning to the concept of 'war criminals'; and this broader definition should be used in proceedings against Axis malefactors. Such a modernized concept of war criminals embraces offenses and crimes cognizable under one or more of the following systems of law: international common (unwritten) law, international conventional (written) law, the criminal law of the vast majority of the civilized nations of the world. It includes among the implicated, not only Heads of States and leading military figures, but also responsible politicians, industrialists, bankers and others who have participated in a lawless nation's criminalistic conspiracies and programs.<sup>46</sup>

Professor Glueck rejected any claim that might be made that the trial of Axis war criminals for crimes committed inside Germany and Japan would violate the territorial principle of jurisdiction and therefore be unjust. His arguments were that the territoriality of sovereignty depended on the existence of friendly relations between states at peace and that, in any event, many states had by legislation expanded the scope of their jurisdiction to include crimes against their nationals wherever committed.<sup>47</sup>

He advanced his thesis to the point at which he advocated the trial and punishment of the major war criminals 'under the solemn auspices of the entire civilized world'. This proposition involved the establishment of an International Criminal Court:

Adequate law for use by an International Criminal Court now exists; and its enforcement by such a tribunal would violate no fundamental tenets of civilized justice. The law for an international tribunal can be drawn from the rich reservoirs of common and conventional law of nations and the principles, doctrines and standards of criminal law that constitute the common denominator of all civilized penal codes.

Professor Glueck also argued, in anticipation of provisions in the London Agreement of 8 August 1945, that the defences of 'acts of State' and 'superior orders' should not be available.

Despite his strong denunciation of Axis criminality and his powerful arguments that the major war criminals should be charged before an International Court, Professor Glueck did not, in 1944, support a criminal charge of 'flagrantly violating solemn treaty obligations or conducting a war of aggression.' The view he then expressed was that the 1928 Pact of Paris 'failed to make violations of its terms an international crime punishable either by national courts or some international tribunal'. Professor Glueck concluded, therefore, that 'the legal basis for prosecutions for violations of the Pact of Paris may be open to question, though the moral grounds are crystal clear'.<sup>48</sup> It is apparent that in 1944 Professor Glueck was of the opinion that prosecution of what he termed the 'Axis chief malefactors' should be focussed on 'violations of the laws and customs of legitimate warfare and of criminal law which they have committed during the course of the conflict'.<sup>49</sup>

Nevertheless, by May 1946 Professor Glueck had changed his opinion relating to aggressive war, which he expressed in a new book,<sup>50</sup> the foreword of which, dated 1 May 1946, was written by Mr. Jackson, then Chief of Counsel for the United States in the trials before the I.M.T. which were then still in progress. The involvement of Professor Glueck in the negotiations leading to the London agreement and Charter and in the proceedings at Nuremberg is stated by Mr. Jackson in

the foreword.<sup>51</sup>

In his 1946 work, Professor Glueck stated:

The foregoing discussion justifies the conclusion, it is believed, that the waging of an aggressive war is not only unlawful but also criminal, and that there is nothing fundamentally 'retrospective' or unjust either in recognising this fact or in holding individual members of a Government personally liable for criminal acts committed in the name of the State. At the very worst, there is only formal retroactivity. If the Court at Nuremberg will decide it has jurisdiction to examine into the alleged ex post facto nature of the Count charging individual Nazi leaders with the crime of aggressive war (something that may be doubtful in view of the fact that the organic Charter of the Court, its constitution, includes the crime in question among crimes 'coming within the jurisdiction of the Tribunal for which there shall be individual responsibility'), it could legitimately be argued that not even formal retroactivity is involved. The rule of universal nonliability of members of a Government invested with absolute powers, for plotting and executing wholesale violations of both international law and the principles of criminal law common to all civilized peoples, is so contrary to reason and justice and so dangerous to the security of law-abiding peoples and to the very existence of law itself, that it must be regarded as extremely doubtful whether it ever was true law.

The term 'ex post facto' is not a legal shibboleth; it ought not to be applied blindly and mechanically, but with reason and discretion, in the light both of its historic significance and of the realities of the modern situation.<sup>52</sup>

The change in the point of view expressed by Professor Glueck was acknowledged by Mr Francis Biddle, the senior American member of the I.M.T. <sup>53</sup>

## SECTION B - THE DISSENT

### GERMAN VIEWS OF 'NUREMBERG LAW'

It is a convenient starting point to examine the views of a number of German professors and lawyers, published collectively in 1955, as edited by Benton and Grimm.<sup>54</sup> Although the content of the work reflects in the main the typical arguments addressed by German defence counsel to the Nuremberg Tribunal, the approach of Wilbourn E. Benton, the co-editor, in the Introductory Chapter was non-partisan. He wrote:

After considering the pre-Nuremberg developments, as well as the Charter and Judgment of Nuremberg, one must conclude—so it seems to the author—that two significant innovations resulted from the War Crimes Trials: (1) The concept of the illegality of aggressive war was transformed into criminality, in the sense that penal sanctions may be applied against those who wage such a war. This was accomplished by assimilating 'crimes against peace' with the violations of the laws of war in which the immunity of state representatives does not exist because such acts are considered criminal under international law. Such an expansion of the notion of the illegality of aggressive war indicates again the concurrent development of the concept with the rules of war, both developments further restricting the sovereignty of nations in the international field. (2) This transformation, together with the new rule recognizing individual responsibility for the crime of war provided the connecting link between Article 6a of the London Charter and the Kellogg Pact. Hence, the search for juridical techniques by which aggressive war may be outlawed and punishment assessed against those who wage such a war, as a part of the past 'is not something that we have left behind us it is ... something that moves along with us.'

### Basic submission on behalf of all German defence counsel

In 19 November 1945, before the pleas of the defendants were taken, Dr. Stallmer, counsel for the defendant Goering, filed a motion, on behalf of all Counsel for the defendants who were present, which involved a preliminary argument relating to the jurisdiction of the Tribunal under the indictment. It is contained in Appendix I of this Chapter. Essentially, the argument was that the charge of 'crimes against peace' did 'not invoke existing international law' but was 'rather a proceeding pursuant to a new penal law, a penal law enacted only after the crime.'

Reliance was placed on the ex post facto principle and the cognate maxim nullum crimen, nulla poena sine lege. It was stated in the motion:

... the Defense consider it their duty to point out at this juncture another peculiarity of this Trial which departs from the commonly recognized principles of modern jurisprudence. The Judges have been appointed exclusively by States which were the one party in this war. This one party to the proceeding is all in one: creator of the statute of the Tribunal and of the rules of law, prosecutor and judge. It used to be until now the common legal conception that this should not be so...

The motion sought a direction by the Tribunal, 'in view of the variety and difficulty of these questions of law' that 'an opinion be submitted by internationally recognized authorities on international law on the legal elements of this Trial under the Charter of the Tribunal'.

The Tribunal gave its ruling on the motion on 21 November 1945. The President said:

A motion has been filed with the Tribunal and the Tribunal has given it consideration, and insofar as it may be a plea to the jurisdiction of the Tribunal, it conflicts with Article 3 of the Charter and will not be entertained. Insofar as it may contain other arguments which may be open to the defendants, they may be heard at a later stage.<sup>55</sup>

The issues of ex post facto law and the nullum crimen sine lege maxim were the subject of extensive argument later in the trial and were referred judgment of the Tribunal. <sup>56</sup>

It is significant from the viewpoint of the defence perception of the indictment, that no mention was made in the motion of the fact that a charge of conspiracy was woven into all four Counts of the indictment.<sup>57</sup>

### Submission by Dr. Hermann Jahrreiss

Dr. Hermann Jahrreiss, counsel for the defendant Jodl, made a restrained, but scholarly, statement to the Tribunal towards the end of the Nuremberg proceedings. Much of the statement was devoted to a consideration of the legal position of Hitler in relation to the people of Germany, in accordance with the 'Führer Principle'. He concluded:

I have already shown how, in the course of a gradual transformation which laid particular emphasis on legal forms, Hitler replaced all the highest authorities of the Weimar period' and combined all the highest competencies in his own person. His orders were law.

The circumstances in a state can be such that the man who is legally the only one competent for the decision on war and peace, may have, in practice, no—or not the sole—authority. If, however, both the sole legal competence and the sole authority in actual practice have ever been coincidental in any state, then such was the case in Hitler Germany. And if, in any question, Hitler did ever go as far as to accept the advice of a third party, then that was certainly not the case in the question of war or peace. He was the arbiter of war and peace between the Reich and other nations—he alone.

I conclude: Sentences against individuals for breach of the peace between states would be something completely new under the aspect of law, something revolutionarily new. It makes no difference whether we view the matter from the point of view of the British or the French chief prosecutors.

Sentences against individuals for breach of the peace between states presuppose other laws than those in force when the actions laid before this Tribunal took place.

The legal question of guilt—and I am here only concerned with that—is thus posed in its full complexity, for not one of defendants could have held even one of the two views of legal constitution on which the chief prosecutors base their arguments.<sup>58</sup>

#### Address by Dr. H. Ehard to German Lawyers

One of the most impressive expositions of the German legal viewpoint concerning 'Nuremberg Law' was that of Dr. Hans Ehard, Minister-President of Bavaria, in an address at a meeting of lawyers in Munich in 1947.<sup>59</sup>

Dr. Ehard not only stated the orthodox objections to the provisions of the London Agreement and Charter, but he went much further. Thus:

Offenses were tried in Nuremberg which the entire German population feels merit the death penalty. These crimes would also have found their retribution by applying the penal codes in force in most nations, including Germany. It is also the conviction of the German people that the society of nations, if it wishes to survive in the age of the most terrible tools of destruction, may and must arm and secure itself against such crimes also with the weapons of law. In our evaluation of the Nuremberg trial we should not be misled by the unworthy wish for a milder judgment of the crime, but only by the desire for an ever-increased perfection of the law and the longing for the final and universal victory of law over might.<sup>60</sup>

Dr. Ehard also went farther than most critics when he said of the 1928 Pact of Paris:

This contractual renunciation of war as a tool of national politics implies, of course, that such a war is contrary to international law and that any nation which in spite thereof wages such a war commits a breach of contract. To this extent one must agree with the judgment. On the other hand, I do not find in the statements of the indictment and of the judgment any convincing proof for the further conclusion that after the treaty such a war was not only unlawful, but that those who plan such a war and wage it thereby commit a crime. In the treaty itself war is not designated as a crime and the renunciation is not reinforced by a sanction. It must be regretted that the treaty is a lex imperfecta to this extent, but in my opinion this cannot be disputed. It certainly is not satisfactory from a moral point of view if, subsequent to the treaty, monstrous deeds such as the waging of a war of aggression may be considered unlawful but not as a punishable offence. But such imperfections are not infrequent in the development of law and they are not always avoidable.<sup>61</sup>

In the context of his address, it seems surprising that Dr. Ehard said:

The Powers could have solemnly declared in the London Agreement that they consider the norms established in the Charter as generally binding for the community of nations. They have not done so.<sup>62</sup> [The author will argue that in fact this proposition was clearly implicit in the London Agreement and Charter].

Of the remaining contributions collected in the work of Benton and Grimm, none is outstanding. Some German counsel who appeared for defendants at Nuremberg repeated submissions which they had made to the Tribunal, but without advancing any new arguments concerning its jurisdiction.<sup>63</sup>

## VIEWS OF JURISTS AND SCHOLARS

Among the vast number of jurists, scholars, lawyers and historians who have made contributions to the literature on 'Nuremberg Law', one of the most prominent and prolific writers was Professor George Schwarzenberger, Professor of International Law in the University of London and Director of the London Institute of World Affairs. The views of Professor Schwarzenberger were crystallised in his two-volume work published in 1968.<sup>64</sup>

On analysis, the views of Professor Schwarzenberger reflect a degree of ambivalence, in that his approach was not merely theoretical but also pragmatic. Professor Schwarzenberger was of the opinion that the Tribunal's case for the criminal character of aggressive war under International morality, before the Nuremberg Charter, stands and falls with the criminal character of breaches of the Kellogg Pact.<sup>65</sup> Schwarzenberger's Interpretation of the Kellogg Pact followed orthodox lines:

While it is self-understood that a breach of the Kellogg Pact is a breach of a treaty, and any breach of treaty constitutes an international tort, the further legal consequence attached to acts of aggression, that is, that they are crimes akin to war crimes in the strict sense, does not necessarily follow from the illegality of a breach of treaty. Whether this is so, or not, depends on the intention of those who have established such a consensual quasi-order.

Actually, the Treaty itself strongly suggests the opposite conclusion ... it is expressly provided that a party to it which should employ war thereafter as an instrument of national policy 'should be denied the benefits furnished by this Treaty.' If so obvious a consequence of a breach of the Pact is stated in so many words, it is unlikely that one of such moment as the transformation of a breach of treaty into a war crime would have been merely implied if the parties had desired to make breaches of the Treaty a criminal offence.

The Nuremberg Tribunal was too easily prepared to read into the Pact such a change in attitude.<sup>66</sup>

That reasoning led Schwarzenberger to conclude that the law which the Nuremberg and Tokyo Tribunals applied in respect of aggressive war was that laid down in their Charters, and as such ex post facto law.

However, Schwarzenberger's pragmatic rationalisation was apparent in his concluding observation on the point:

To deal fairly with the accused before the Nuremberg and Tokyo Tribunals, it would have sufficed, and would probably have been preferable, to state that men who had broken international laws as indiscriminately as the totalitarian aggressors had become international outlaws. Thus, whatever law was applied to them, this was done, not because they were entitled to its protection, but because the victors considered that they owed it to themselves as civilised nations to apply to the accused the law laid down in the Nuremberg and Tokyo Charters.<sup>67</sup>

In relation to crimes against humanity, Schwarzenberger expressed a similar view which embodied both theoretical and pragmatic elements. He rejected any argument that the provisions in the Nuremberg and Tokyo Charters were declaratory of international customary law, but qualified his criticism by stating:

All the four Powers intended to do was, under the heading of crimes against humanity, to deal retrospectively with particularly ugly facets of the relapse of two formerly civilised nations into a state of barbarism.<sup>68</sup>

On the concept of conspiracy, Schwarzenberger said:

While it is possible to justify the policies behind the conspiracy clauses, these clauses were as much innovations in 1945 international law as those relating to crimes against peace and humanity.<sup>69</sup>

Schwarzenberger was restrained in his treatment of the provisions of the London Charter concerning criminal organisations. Two citations illustrate his fundamental opinions:

To assess fairly Articles 9 and 10 of the Nuremberg Charter, it is necessary to bear in mind the mass character of the crimes committed by those associated with the Nazi system and the apocalyptic depths to which its leaders and followers had sunk.

In the face of bestiality organised on so colossal a scale, the care taken by the Nuremberg Tribunal in trying to make sure that, over and above the safeguards laid down in the Nuremberg Charter, those most guilty should be separated from the less guilty members of these criminal organisations was a remarkable achievement.<sup>70</sup>

Schwarzenberger reached the crux of his thesis when he wrote:

Crimes against peace, crimes against humanity, conspiracies to commit any type of war crime, and the declaration of organisations to be criminal were innovations introduced into international law by the Charters of Nuremberg and Tokyo.

The manner in which the two international Tribunals attempted to dispose of this defence is indicative of their uneasiness on this point. In order to see the issue in a proper perspective, it is necessary to keep in mind the root and meaning of war crimes jurisdiction. Its root is reprisal and its meaning is authority, on this basis, and, therefore, by international law, to exercise an extraordinary form of State jurisdiction. To describe war crimes as if they were based on rules of a substantive international criminal law merely leads to confusion.

The real problem is whether the victors were entitled to extend -as they did their policies of reprisal, and, for this purpose, ignore the tenet of legal policy [emphasis added in original] that it is advisable to avoid retrospective legislation.<sup>71</sup>

It is apparent from the cited passages (including the observations in footnote 71) that Professor Schwarzenberger should be treated in a category of his own. He conceded, as a matter of strict legal analysis, that many of the arguments which had been advanced against the validity of 'Nuremberg Law', insofar as established international customary law was concerned, were technically correct, but he refused to deny the right of the victorious Powers to deal with the Nazi fiends in the manner in which they did.

The principal purpose of the work published in 1951 by Viscount Maugham, formerly Lord Chancellor of Great Britain, was, as he stated in the Preface, 'to establish the principle, contrary to the view recently accepted by the General Assembly of the United Nations, that in any future war followed by trials and punishment of war criminals the only persons who can justly or fairly be tried and convicted are those who are proved to have been guilty of the violation of "the laws and usages of war"'.<sup>72</sup>

Viscount Maugham also stated that 'the gravest mistake in the Charter was in making participation in an aggressive war or a war in breach of treaties a terrible crime . . . In doing so it lumped together in the same general condemnation those deemed to be the real author or authors of the war ... with the hordes of Germans of all sorts and kinds ...'.<sup>73</sup> In fact, the London Agreement and Charter stated that the jurisdiction of the Tribunal was referable to the major war criminals of the European Axis.<sup>74</sup>

Viscount Maugham's criticism of 'Nuremberg Law' was most trenchant in respect of the prescription in the London Charter of 'crimes against peace':

... if punishment of statesmen, soldiers, sailors and airmen is to be rested on the allegation that they have participated in aggressive war, there must certainly be an independent and unprejudiced Tribunal to decide the intricate questions of a political nature which will arise.<sup>75</sup>

Viscount Maugham stigmatised as 'flagrantly unjust' the provisions of Article 7 (heads of state) and Article 8 (the defence of superior orders).<sup>76</sup>

The views of Viscount Maugham may be judged against the opinions he expressed concerning 'the exercise of ... sovereign legislative power by the countries to which the German Reich had unconditionally surrendered; and the undoubted right of those countries to legislate for the occupied territories had been recognised by the civilised world'.<sup>77</sup> Viscount Maugham then stated:

So far there is, I think, no doubt from the point of view of law, whatever may be said against the Charter from the standpoint of justice or policy. But the judgment continued 'The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal ... it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law'. This sentence in my respectful opinion was erroneous. The Charter, as we have seen, was not intended or designed to express international law. Nor could four nations or four judges from those nations create a rule of international law which had never previously been published to the world or agreed to by the concert of Nations.<sup>78</sup>

Viscount Maugham acknowledged:

Complete sovereignty does not pass except in the case of debellation, but temporary legislative power does pass to the occupying powers. It comes to an end with the occupation.<sup>79</sup>

As a sequence to his discussion of the Pact of Paris, Viscount Maugham stated:

The alleged code of crimes contained in Article 6, sub-clause (a) could not have existed before the Paris Pact of 1928, since, as above stated, before that treaty all wars were regarded as permissible. There have been since 1928 plenty of legal reports, publications and meetings concerned with international law. There is no trace of a new rule of that law bringing into force as a provision of that law so vital a sanction as is now under consideration. As regards the actual trial at Nuremberg it is sufficient to say that no one has ever explained how, except as an Act of State, a military court could be set up in a foreign country, consisting of foreign Judges, appointed to try foreigners in their own land for committing crimes under a new system of law. This does not resemble a rule of international law as hitherto accepted by the nations.<sup>80</sup>

One of the most consistent and vocal critics of the British war crimes trials policy and the actual conduct of the trials in accordance with 'Nuremberg Law', was Lord Hankey, a prominent British statesman and a member of the British Cabinet during World War II. He expressed his views in a number of speeches in the House of Lords. In 1950 he published a monograph, Politics Trials and Errors,<sup>81</sup> in which he critically examined the policies and practice relating to the Nuremberg principal trial essentially from a political viewpoint. However, he did state his opinion on some of the legal issues which was consonant with that of Viscount Maugham, to whose work (op. cit., supra) he contributed a postscript.

His strongest criticism was directed at the provisions of the London Charter relating to crimes against peace, and the impracticability of defining a 'war of aggression', in the light of history. He wrote:

... for centuries past and in recent times, certainly during the war, technical aggressions have been committed by most of the principal allied European Powers. The Western Powers did not hesitate to ally themselves with an Eastern Power whose aggressions had been flagrant, recent and on a large scale. In spite of that the German political and military Leaders were singled out to be put on trial for their own aggressions and were not even allowed to make the point in their defence that their enemies had been doing the same thing right up to the date of the trial 'as evidence of a general practice accepted by Law' (Art. 38, 1 (b) of the Statute of the International Court of Justice). Moreover, they were tried on a crime created by an ex post facto law drafted by the Victors for this particular Trial of the Vanquished. Yet, the Germans, and we ourselves, and all posterity are expected to accept that as a fair trial.<sup>82</sup>

The focus of much of Lord Hankey's criticism was the fact that the Allied Powers had insisted on the unconditional surrender of the German Reich (see Chapter 18). He asserted that English History appears to record no case of a demand for



'unconditional surrender' before 1943, and that fifteen major wars since the end of the sixteenth century, on examination, supported this assertion. He cited part of a speech delivered to the House of Commons by the British Prime Minister, Mr. Churchill:

Unconditional Surrender means that the victors have a free hand. It does not mean that they are entitled to behave in a barbarous manner, nor that they wish to blot out Germany from among the nations of Europe. If we are bound, we are bound by our own consciences to civilization. We are not to be bound as the result of a bargain struck. That is the meaning of 'Unconditional Surrender'.<sup>83</sup>

Lord Henkey's view was that the Allied Powers had not analysed with any precision what they meant by 'unconditional surrender' and that fact vitiated the establishment of a Tribunal composed of representatives of the victors to try only the vanquished.

For many years after the end of the war, Lord Hankey was a vigorous advocate of the abandonment of any further war crimes trials. Quoting from a speech he had made in the House of Lords, he said:<sup>84</sup>

... I cannot see that we gained anything by the Nuremberg trials, and I shall seek to show ... that we have gained nothing from the Tokyo trials. ... The most urgent thing is to bring all these trials to an end, and if other nations will not agree, to decline any further British co-operation. We must not be too mealy-mouthed about it. It is four years after the war.

One of the most succinct published contemporary criticisms of 'Nuremberg Law' was that of J.H. Morgan, K.C., Professor Emeritus of Constitutional Law in the University of London, formerly British Deputy Adjutant-General and Vice-Chairman of the British Government 'War Crimes' Committee of 1918-1919 (commonly known as the 'Birkenhead Committee'), as well as being the Chairman of that Committee's Sub-Committee on Law. His work, *The Great Assize*, is referred to *supra* in Chapter 11 in a limited context.<sup>85</sup>

Professor Morgan did not question the correctness in law of Count 3 of the Nuremberg indictment. He acknowledged that offences against the laws and customs of war, whether or not the law was 'aggressive', had for long been established as an integral part of international law and that the categories thereof had been expressly prescribed in the Hague Conventions of 1899 and 1907. He therefore regarded Count 3 as 'unimpeachable'.<sup>86</sup>

Count 4 (crimes against humanity), with its wide focus on 'inhumane acts committed against any civilian population before or during the war, or prosecutions on political, racial, or religious grounds, in execution of or in connection with any Crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated' (Article 6(c) of the Charter), was described by Professor Morgan as 'a new offence, previously unknown to International Law':

I know of no authority in law at all for the rubric 'crimes against humanity, and it is significant that the Nuremberg Court made no attempt to find one'.<sup>87</sup>

Professor Morgan also was critical of the drafting of Count 4, particularly the pleading in which reference was made to 'violations of ... the general principles of criminal law as derived from the criminal law of all civilised nations'. He argued:

I do not quite know how the violation of 'a principle' can be called a crime. ... Still less do I know what general principles can be 'derived' from the criminal law of all 'civilised' nations.<sup>88,89</sup>

With regard to Count 2 of the indictment (paragraph 6(a) of the Charter). Professor Morgan's view was that the defendants were charged 'with something which hitherto had defied all definition in International Law and which ... had never been made a "crime" in International Law at all.' His conclusion was:

Aggressive war will never be a crime in law until the legislature of this country, to say nothing of other countries, enacts a statute giving effect to the pious words of the Pact of Paris. No legislature, not even the American Congress, has ever done this nor is it likely to do so.<sup>90</sup>

Professor Morgan was particularly trenchant in his criticism of the conspiracy Count, principally because '... for the first time in history, military court, deriving its jurisdiction from the fact of war, was invested with jurisdiction by the Charter to try the accused for alleged offences committed in time of peace extending back to six years before the outbreak of war' (emphasis added in the original).<sup>91</sup>

The concluding overall view of Professor Morgan was:

... it appears to me that the Counts of Conspiracy, of 'Aggressive War', and of Crimes against Humanity had better never have been framed at all. They were, indeed, as gratuitous as they were unprecedented, for in the case of all but two of the defendants who were convicted those defendants were also convicted on what I have called the one invulnerable Count of 'War Crimes'. As regards that particular Count, not only the law but the evidence was unimpeachable and indeed overwhelming.<sup>92</sup>

A critical approach, similar in substance to that of Professor Morgan, was taken by Professor G.A. Finch, Editor-in-Chief of the American Journal of International Law, and a frequent contributor to that Journal.

In an analysis of the London Charter, Professor Finch defended the manner in which the International Military Tribunal was constituted. His comment on Counts 3 and 4 of the Indictment was brief but incisive:

No substantial objection lies to the trial of [crimes in violation of the laws and customs of war], to the judgment, or to the execution of the sentences. The laws and customs of war, including those of military occupation, are well established in international law. They are enacted in national legislation, codified in military manuals, incorporated in binding international conventions, and affirmed by the immemorial practice of states, thus becoming a part of the common law of war. It is accepted international law, conventional as well as customary, that a belligerent has authority to try and punish individuals for crimes which constitute violations of the laws and customs of war, as well as the laws of humanity, when such persons fall within his power. (emphasis added)

We therefore conclude that no question of ex post facto legislation or punishment was involved in the proceedings at Nuremberg on Count 3 of the indictment, and they were legally adapted to the vindication of accepted principles of international law.<sup>93</sup>

Professor Finch supported the strict legality of Count 4 (crimes against humanity) and argued that in cases in which crimes against humanity were not justiciable, for whatever reason, as war crimes, the governments of the Allied Powers nevertheless had jurisdiction to punish those who had committed crimes against humanity. This right arose from the fact that the Allied Powers held sovereignty over the State of Germany in their position as a condominium of occupying Powers.

At this stage in his analysis, Professor Finch moved to a different view concerning the London Charter. He criticised the inclusion of provisions relating to crimes against humanity committed before the war, on the basis that 'there is no rule of international law, customary or conventional, by which such acts committed before the commencement of hostilities can be punished by the subsequent military occupants.'<sup>94</sup>

The conclusion of Professor Finch was:

Had the indictment ended here, the trials and judgment would rest upon solid legal principles and practice. Conviction upon additional charges of doubtful legal validity added nothing to the satisfaction of retributive justice already meted out on Counts 3 and 4. Its contribution to the strengthening of international law is limited to an unprecedented decision by a military tribunal of the victors, trying captured enemies which it is hoped will

institute a new custom establishing the juridical principle that aggressive war-making is illegal and criminal.<sup>95</sup>

In a criticism of Counts 1 and 2 jointly, Professor Finch said:

We are not urging the untenable proposition that all criminals of a class must be punished, or none at all; nor do we overlook the lack of jurisdiction by the Nuremberg Tribunal under its Charter to try and punish anybody but enemy nationals. Our criticisms are directed to the retroactive effect of the dictum of the Tribunal that certain acts not treated as criminal by the prosecuting governments at the time they took place were subsequently transformed into crimes or conspiracies against peace for which ex post facto punishment is now legally justifiable.<sup>96</sup>

The principal basis for the cited criticism was that both the terms of the Pact of Paris and the history of the official attitude of the United States Government towards its interpretation made it 'impossible to accept the thesis of the Tribunal that a war in violation of the Pact was illegal on 1 September 1939.'<sup>97</sup>

It follows from the expressed views of Professor Finch that he considered that the terms of the London Charter, and therefore the Counts in the indictment, should have been limited to war crimes and crimes against humanity.

.....

The writer has included Judge Bert V.A. Roling among those who publicly dissented from the validity of the jurisdictional basis for the Nuremberg and Tokyo Charters primarily because of his dissenting judgment in the I.M.T.F.E. proceedings and also because of the balanced and rational views he expressed some twenty five years later.<sup>98</sup>

Critical though it was from a broad juridical viewpoint, Judge Roling's assessment in 1973 was realistic. In a discussion of what he termed the 'introduction of the concept of the crime against humanity, formulated in view of German behaviour toward German Jews', he stated:

Persecution of a group of people, on the basis of race or religion, in occupied territory would already have been covered by the concept of the conventional war crimes [but not those committed before a state of war existed]. Consequently, in most cases the indictment for crimes against humanity amounted only to a charge of qualified war crimes, committed on a large scale, on the ground of a specific policy. German atrocities against German Jews compelled the Allies to prosecute for a specific internal policy [emphasis added]. This amounted to a new concept of the place of the national state, of the individual within his national state, and of the role of humanity as a guardian of a minimum standard of state decency. The Genocide Convention, 1948, has consolidated this new concept, and has recognized its validity in peace and in war.<sup>99</sup>

In relation to crimes against peace, Judge Roling approved the observation of Max Radin:

It is impossible to determine, with certainty whether public opinion at the present time supports the doctrine of individual guilt for crimes against peace. The impossibility is due to the fact that the three types of crimes [excluding conspiracy] are inevitably fused in the public mind by being combined in a single trial. To regret any one of the three creates the impression of defending men whose vicious actions seem to place their guilt beyond the reach of any sort of clemency.<sup>100</sup>

The realism of Judge Roling's appraisal in 1973 is clear from the following extract:

The political reasons for having a trial in which Germans would be tried for the crime against peace are very clear. The U.S. Government had acted on the assumption that launching any attack on the peace was an international

crime, and it wanted to prove by charter and judgment that launching a war of aggression constituted a criminal violation of the law of nations. It is beyond doubt that before World War II there had been no question of individual criminal responsibility for a violation of the Kellogg-Briand pact. Neither this treaty nor the resolutions of the League of Nations or the abortive treaties in which it was stated that aggressive war was an international crime had the effect of creating international criminal law.

It is at this moment a practically undisputed thesis that before World War II positive international law did not recognize, the crime of aggressive war for which individuals could be punished. No wonder that the U.N. War Crimes Commission did not consider aggressive war an international crime.<sup>101</sup>

## CONCLUSION

The examples, derived from the massive literature on the subject, which have been given in this Chapter, illustrate the very wide and fundamental differences of opinion among both contemporary and more modern writers on 'Nuremberg Law'. The disparity is probably most starkly revealed by a comparison between the Judgment of the Nuremberg Tribunal and the 'Dissentient Judgment' of Judge Pal, the representative of India on the Tokyo Tribunal.

In its Judgment, the Nuremberg Tribunal stated:

The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in the view of the Tribunal, as will be shown, it is the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.

.....

In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.

.....

To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.<sup>102</sup>

The dissenting judgment of Judge Pal was contained in 1,049 pages. He discussed the opinions of a number of prominent jurists, and stated

After giving my anxious and careful consideration to the reasons given by the prosecution as also to the opinions of the various authorities I have arrived at the conclusion:

1. That no category of war became criminal or illegal in international life;
2. That the individuals comprising the government and functioning as agents of that government incur no criminal responsibility in international law for the acts alleged;
3. That the international community has not yet reached a stage which would make it expedient to include judicial process for condemning and punishing either states or individuals.

On the basis of his reasoning, Judge Pal was of the view that all the defendants should be found guilty of all charges in the indictment.

In the words of Judge Roling, 'it is indeed a real contrast: the supreme international crime, in the opinion of Nuremberg and the majority Tokyo judgment—no crime at all according to the dissenting opinion of Judge Pal.'<sup>103</sup>

## NOTES

1. Tutorow, War Crimes, War Criminals, and War Crimes Trials, Greenwood Press, New York, 1986.
2. For an informative review of the 7th edition, see (1952) 29 B.Y.I.L., Reviews of Books, by F.A. Mann: 'The result is a book which has no rival in its field'. See also, on a similar theme, the following articles by Sir Hersch Lauterpacht: 'The Subject of the Law of Nations', (1947) 63 L.Q.R., pp. 438-460; (1948) 64 L.Q.R., pp. 97-119; 'Rules of Warfare in an Unlawful War' in Law and Politics in the World Community, George A. Lipsky (ed.), University of California Press, Berkeley and Los Angeles, 1953; 'The Law of Nations and the Punishment of War Crimes', (1944) 21 B.Y.I.L., pp. 58-95.
3. Oppenheim, op. cit., p. 192.
4. Ibid., p. 582.
- 4a. Ibid., p. 579.
5. (1946) 62 L.Q.R., pp. 40-52.
6. As examples, see minutes of the meeting of the Commission on 10 October 1944, as cited in Chapter 5 supra; History of U.N.W.C.C., Preface, pp. vi and vii; History of U.N.W.C.C., Introductory Chapter, p. 10, in which Lord Wright said: 'The concept [of crimes against peace] was not novel either in 1945, or in 1939 when the war was initiated by Hitler and his associates. It was at least implicit in those articles of the Versailles Treaty which provided for the prosecution of the Kaiser. It had been frequently approved by weighty arguments of distinguished lawyers and statesmen in the years between the two wars. In 1928 it was explicitly embodied in a fundamental international document, the Kellogg-Briand Pact, which was based on the distinction between a just and an unjust war, which was certainly an ancient, or at least a medieval, Christian principle. It was unpalatable in certain quarters, because it was directly contrary to the theory of totalitarian war. ... It was indeed a moral and political principle which had acquired the status and definiteness of a principle of international law and was by 1939 ripe for enforcement.'
7. Stimson, 'The Nuremberg Trial: Landmark in Law', (1947) 25 Foreign Affairs, pp. 179-189, cited passim by Francis Biddle (the United States judge at Nuremberg) in (1947) 33 Virginia Law Review, pp. 679-697.
8. See Chapter 6, supra, passim.
9. Bosch, Judgment on Nuremberg, University of North Carolina Press, Chapel Hill, 1970, especially pp. 24, 25 and 35-39.
10. Stimson, loc. cit., p. 180.
11. Ibid., p. 185.
12. Idem.
13. Woetzel, The Nuremberg Trials in International Law, second impression revised, Stevens & Sons Limited, London, 1962.
14. Brownlie, International Law and the Use of Force by States, Clarendon Press, Oxford, 1963, pp. 74-75.
15. Ibid., pp. 75-76.
16. Ibid., pp. 79-80.
17. Ibid., p. 91. In the work of which he was the joint editor with Professor Nanda, A Treatise on International Criminal Law, vol. 1, Crimes and Punishment, published by Charles C. Thomas, Springfield, Illinois, 1973, p. 161,

Professor Bassiouni acknowledged uncritically the cited views of Professor Brownlie.

18. Stone, Legal Controls of International Conflict, Maitland Publications Pty. Ltd., Sydney, 1954, p. 357.
19. Ibid., pp. 357-358.
20. Ibid., p. 359.
21. Ibid., pp. 359-360.
22. Ibid., p. 360.
23. Ibid., p. 369.
24. Jescheck, E.P.I.L., vol. 4, pp. 50-57, at p. 51. Professor Jescheck is the author of a number of other works and articles on war crimes trials (see those listed in Tutorow, op. cit., index of authors, p. 528). In personal discussions with the writer in recent years in Tasmania and West Germany, Professor Jescheck expressed the view, consistent with that advanced in the cited article, that the Allied Powers had no alternative but to institute the Nuremberg process. However, he rejected the arguments (for example, that of Lord Wright) that in 1945 there already existed a rule of international law which conferred legal authority for the execution of the London Agreement and Charter, particularly in relation to wars of aggression.
25. Ibid., p. 52.
26. Ibid., pp. 55-56.
27. Ibid., p. 56.
28. Goodhart, (1946) 58 Juridical Review, 'The Legality of the Nuremberg Trials', pp. 1-19. (See also Goodhart, (1947) International Law Quarterly, 'Questions and Answers Concerning the Nuremberg Trials', pp. 525-531).
29. Ibid., p. 3.
30. Ibid., p. 5.
31. Ibid., p. 9.
32. Joyce v. Director of Public Prosecutions (1946) 1 All. E.R. 186 at p. 189.
33. (1945) 39 A.J.I.L., pp. 257-285. Professor Wright was for a long period a member of the Board of Editors of the American Journal of International Law.
34. (1947) 41 A.J.I.L., pp. 38-72.
35. Ibid., pp. 45-46.
36. Ibid., p. 46.
37. Ibid., p. 49.
38. Ibid., p. 56.
39. Ibid., p. 59.
40. Ibid., p. 72.

41. (1948) 42 A.J.I.L., pp. 405-414.
42. Ibid., p. 405.
43. Ibid., p. 407.
44. Ibid., p. 414.
45. Glueck, War Criminals: Their Prosecution and Punishment, Alfred A. Knopf, New York, 1944.
46. Ibid., p. 179.
47. See the Australian War Crimes Act 1945, s.12 of which conferred jurisdiction in respect of war crimes 'committed, in any place whatsoever, whether within or beyond Australia, against British subjects or citizens of any Power allied or associated with His Majesty in any war ...'.
48. Glueck, op cit., p. 38.
49. Idem.
50. Glueck, The Nuremberg Trial and Aggressive War, Alfred A. Knopf, New York, 1946. The work had been published in February 1946 in (1946) 59 Harvard Law Review, pp. 396-456.
51. Ibid., Foreword by Jackson, pp. vii-viii, in which he stated:  
  
When negotiations for a Four-Power agreement for the trial of Nazi war criminals began in London in June 1945, Professor Glueck's book [that is, the work published in 1944 ] was one of the few published studies of the problems involved in trial. When I was appointed as Representative and Chief of Counsel for the United States, he became an Advisor during those negotiations. As captured documents began to pour in, he also devised a system for summarizing and indexing them, so that a large mass of material could be readily available on any particular point. His original plan is substantially the system pursued throughout the Nuremberg trial. Dr. Glueck's study of the basis of criminal liability of the Nazi leaders, therefore, is not the result of merely theoretical knowledge. It is based on practical working acquaintance with the problems which must be faced in the application of the law to the accused.
52. Ibid., pp. 91-92.
53. See (1947) 33 Virginia Law Review, Francis Biddle, 'The Nuremberg Trial', p. 679.
54. Nuremberg: German Views of the War Trials, (Benton and Grimm editors), Southern Methodist University Press, Dallas, 1955.
55. Nuremberg Trial, I.M.T., vol. II, p. 95.
56. I.M.T. Judgment, pp. 38-40.
57. See Chapter 8.
58. Nuremberg Trial, I.M.T., vol. XVII, pp. 458-494.
59. The paper delivered by Dr. Ehard was originally published in *Suddeutsche Juristen-Zeitung* (July, 1948), Vol. III, No. 7, cols. 353-68, and republished in (1949) 43 A.J.I.L., pp. 223-245. Tutorow, op. cit., p. 306 states, with reference to the paper: 'A German viewpoint ... which was published with the blessing of Robert H. Jackson, not because he agreed with it, but because he thought it an intelligent and scholarly viewpoint that raised criticism of the trial to a more profitable level'.
60. Ibid., pp. 78-79.

61. Ibid., p. 95.
62. Ibid., p. 101.
63. For example, Flottenrichter Kranzbuhler (counsel for Doenitz), Dr. Carl Haensel (associate counsel for the SS and SD) and Dr. Dix (counsel for Schacht).
64. Schwarzenberger, International Law, Vol. II, Stevens & Sons Limited, London, 1968. In this work, Schwarzenberger expanded on the views, he had expressed more than twenty years previously in two articles entitled 'The Judgment of Nuremberg' published in (1947) Tulane Law Review, pp. 329-361 and (1948) Year Book of World Affairs, pp. 94-124. See the analysis of the literature of Schwarzenberger by Associate Professor Robert A. Friedlander, 'Power Politics and the Rule of Law: Professor Schwarzenberger Reconsidered', (1975) DePaul Law Review, pp. 836-852, in which Friedlander wrote:

Schwarzenberger is fully cognizant of the criticism that the judgment was an exercise of retroactive legislation on the part of a newly created sovereign state, a charge leveled against the Eichmann proceedings as well as against the Nuremberg and Tokyo trials. His answer is both moral and historical, though not totally satisfactory. Under these unique circumstances, the application of retroactive criminal law is in harmony with the international ius aequum, the accepted customary practice where rights are relative and may be asserted if exercised reasonably and in good faith. If the acts subject to a retroactive statute are deemed criminal by any civilized community, then the passing and enforcement of such retroactive legislation is a vindication of the accepted norms of civilization and properly subject to court jurisdiction. Thus, 'from an ethical point of view, the proceedings before the [Israeli] Court stand the test of the requirements of the Rule of Law.'

65. Schwarzenberger, op. cit., p. 491.
66. Ibid., p. 492.
67. Ibid., p. 495.
68. Ibid., pp.498-499.
69. Ibid., p. 502.
70. Ibid., p. 506.
71. Ibid., pp. 519-520. Schwarzenberger expanded the cited extract by adding:

The Short answer to this counsel of perfection is that the Powers which were responsible for the organisation of the Nuremberg and Tokyo Trials did not purport to deal with individual infractions of international law committed by their enemies. One or the other of the victorious nations, too, might have committed this or that aggressive act. The manner in which some of the victors treated groups and classes of their own subjects might have left much to be desired or fallen below the minimum standard of international law applicable to foreign nationals. It might even have happened that members of their own armed forces had committed individual war crimes which ought to have found, and did not find, condign punishment.

What the totalitarian aggressors had done was of a different dimension. They had developed aggression into a system, defied the most primitive canons of humanity in a deliberate assault on civilisation and committed war crimes on a scale and with a brutality symptomatic of an even deeper malaise: the conscious relapse of nations which had emerged long ago from primordial savagery into a state of mechanised barbarism.

Such men, leaders and followers alike, had forfeited any claim to be dealt with under law. To be granted the privilege of an extended application of the law of reprisal as a standard by which to measure the deeds of the worst offenders, was a concession they did not deserve, but a boon granted to them because, although they acted like beasts, they wore the faces of men.



72. Maugham, U.N.O. and War Crimes, John Murray, London, 1951, Preface, p. v. The work contained a postscript by Lord Hankey (see infra, this Chapter).
73. Ibid., p. 39.
74. See the title and Article 3 of the Agreement and Article 1 of the Charter.
75. Ibid., p. 42.
76. Ibid., p.47.
77. I.M.T. Judgment, p. 38.
78. Maugham, op. cit., p. 51.
79. Ibid., p. 51, footnote 1.
80. Ibid., p.60. And see the extracts from the Preface by Viscount Maugham to the monograph of Morgan, op. cit., cited in Chapter 11, footnote 15 .
81. Hankey, Politics Trials and Errors, Pen-in-Hand Publishing Co. Ltd., Oxford, 1950.
82. Ibid., p. 16.
83. Ibid., p. 34 (Hansard, Commons, 22 February 1944, Col. 699).
84. Ibid., p. 69.
85. Morgan, The Great Assize, John Murray, London, 1948.
86. Ibid., p. 19.
87. Ibid., p. 21.
88. Ibid., p. 22.
89. It should be noted that of the defendants convicted at Nuremberg, and sentenced to death or terms of imprisonment, only two—Streicher and Shirach—were found guilty solely of crimes against humanity. It is the writer's view, that, on the findings of fact made by the Tribunal, both these accused could have been charged with war crimes 'stricto sensu' (Count 3) .
90. Ibid., p. 38.
91. Idem.
92. Ibid., p. 40.
93. (1947) 41 A.J.I.L., pp. 20-22.
94. Ibid., p. 23.
95. Ibid., p. 24.
96. Ibid., p. 28.

97. Ibid., p. 33.
98. Bassiouni and Nanda, A Treatise on International Law, Charles C. Thomas, Illinois, 1973, Vol. 1, pp. 590-619, 'The Nuremberg and the Tokyo Trials in Retrospect' (by Bert V.A. Roling).
99. Ibid., pp. 591-592.
100. Radin, (1946) Foreign Affairs, 'Justice at Nuremberg', pp. 369-384.
101. Roling, loc. cit., p. 595 (See Chapter 5).
102. I.M.T. Judgment, p. 38 et seq.
103. Roling, loc. cit., p. 601.

## APPENDIX I MOTION ADOPTED BY ALL DEFENCE COUNSEL

Two frightful world wars and the violent collisions by which peace among the States was violated during the period between these enormous and world embracing conflicts caused the tortured peoples to realize that a true order among the States is not possible as long as such State, by virtue of its sovereignty, has the right to wage war at any time and for any purpose. During the last decades public opinion in the world 'challenged with ever increasing emphasis the thesis that the decision of waging war is beyond good and evil. A distinction is being made between just and unjust wars and it is asked that the Community of States call to account the State which wages an unjust war and deny it, should it be victorious, the fruits of its outrage. More than that, it is demanded that not only should the guilty State be condemned and its liability be established, but that furthermore those men who are responsible for unleashing the unjust war be tried and sentenced by an International Tribunal. In that respect one goes now-a-days further than even the strictest jurists since the early Middle Ages. This thought is at the basis of the first three counts of the Indictment which have been put forward in this Trial, to wit, the Indictment for Crimes against Peace. Humanity insists that this idea should in the future be more than a demand, that it should be valid international law.

However, today it is not as yet valid international law. Neither in the statute of the league of Nations, world organization against war, nor in the Kellog-Briand Pact, nor in any other of the treaties which were concluded after 1918 in that first upsurge of attempts to ban aggressive warfare, has this idea been realized. But above all the practice of the League of Nations has, up to the very recent past, been quite unambiguous in that regard. On several occasions the League had to decide upon the lawfulness or unlawfulness of action by force of one member against another member, but it always condemned such action by force merely as a violation of international law by the State, and never thought of bringing up for trial the statesmen, generals, and industrialists of the state which resorted to force. And when the new organization for world peace was set up last summer in San Francisco, no new legal maxim was created under which an international tribunal would inflict punishment upon those who unleashed an unjust war. The present Trial can, therefore, as far as Crimes against Peace shall be avenged, not invoke existing international law, it is rather a proceeding pursuant to a new penal law, a penal law enacted only after the crime. This is repugnant to a principle of jurisprudence sacred to the civilized world, the partial violation of which by Hitler's Germany has been vehemently discountenanced outside and inside the Reich. This principle is to the effect that only he can be punished who offended against a law in existence at the time of the commission of the act and imposing a penalty. This maxim is one of the great fundamental principles of the political systems of the Signatories of the Charter of this Tribunal themselves, to wit, of England since the Middle Ages, of the United States since their creation, of France since its great revolution, and the Soviet Union. And recently when the Control Council for Germany enacted a law to assure the return to a just administration of penal law in Germany, it decreed in the first place the restoration of the maxim, "No punishment without a penal law in force at the time of the commission of the act." This maxim is precisely not a rule of expediency but it derives from the recognition of the fact that any defendant must needs consider himself unjustly treated if he is punished under an ex post facto law.

The Defense of all defendants would be neglectful of their duty if they acquiesced silently in a deviation from existing international law and in disregard of a commonly recognized principle of modern penal jurisprudence and if they suppressed doubts which are openly expressed today outside Germany, all the more so as it is the unanimous conviction of the Defense that this Trial could serve in a high degree the progress of world order even if, nay in the very instance where it did not depart from existing international law. Wherever the Indictment charges acts which were not punishable at the time the Tribunal would have to confine itself to a thorough examination and findings as to what acts were committed, for which purposes the Defense would cooperate to the best of their ability as true assistants of the Court. Under the impact of these findings, of the Tribunal the States of the international legal community would then create a new law under which those who in the future would be guilty of starting an unjust war would be threatened with punishment by an international Tribunal.

The Defense are also of the opinion that other principles of a penal charter contained in the Charter are in contradiction with the maxim, "Nulla Poena Sine Lege".

Finally, the Defense consider it their duty to point out at this juncture another peculiarity of this Trial which departs from the commonly recognized principles of modern jurisprudence. The Judges have been appointed exclusively by States which were the one party in this war. This one party to the proceeding is all in one creator of the statute of the Tribunal and of the rules of law, prosecutor and judge. It used to be until now the common legal conception that this should not be so: just as the United States of America, as the champion for the institution of international arbitration and jurisdiction, always demanded that neutrals, or neutrals and representatives of all parties, should be called to the Bench. This principle has been realized in an exemplary manner in the case of the Permanent Court of International Justice at The Hague.

In view of the variety and difficulty of these questions of law the Defense hereby pray:

That the Tribunal direct that an opinion be submitted by internationally recognized authorities on international law on the legal elements of this Trial under the Charter of the Tribunal.

On behalf of the attorneys for all defendants who are present.

**CHAPTER 18**

1. Introduction
2. Sources of International Law
3. The legal status of Germany after its unconditional surrender on 8 May 1945.
4. The Analogy of the development of the common law.
5. Character and Composition of the Nuremberg Tribunal.
6. The Legal Effect of the Pact of Paris.
7. Nullem crimen sine lege and ex post facto.
8. The acts of state doctrine: Individuals as the subject of international law.
9. Just and Unjust Wars.
10. Tu Quoque
11. Further consideration of the indictment.
12. The position of Red Cross
13. Nuremberg Law as a Precedent

## CHAPTER 18 CONCLUSIONS ON THE NUREMBERG PROCESS

### INTRODUCTION

It is noteworthy that in the judgments delivered in the thirteen separate trials at Nuremberg, the judges placed little, if any, emphasis on the divergent views which were the product of contrasting philosophies in a formal jurisprudential sense.<sup>1</sup> The prime reason for this refusal to canvass jurisprudential concepts in the field of international criminal law was, no doubt, that the judges uniformly determined that the law of the Nuremberg and Tokyo Charters was 'decisive and binding' upon them.

The evaluation of the Nuremberg process by international law scholars has been substantially based upon their adherence to a specific legal philosophy. I agree with the observation of Professor Quincy Wright that 'the favourable or unfavourable character of comments upon events related to international law often depends less upon the nature of the events than upon the theory of international law assumed by the commentator'.<sup>2</sup> The disparity in academic views is illustrated by the statistical analysis of Professor Bosch.<sup>3</sup>

A subsidiary paradox was injected into the academic debate in 1950 by the claim of Professor Schwarzenberger that "International Law has not yet evolved a branch of criminal law of its own."<sup>4</sup>

Irrespective of the controversy concerning the existence of an international criminal law and the difficulty of 'establishing its content in a given case', it is the view of Professor Jescheck that:

... a state and its citizens do not exist in and for themselves, but instead are organised in manifold ways into an international community of nations. Accordingly, the domestic criminal law of states is not concerned exclusively with internal events, but rather often produces effects reaching beyond its own national borders and the citizens of its own state. That the international community of nations itself could possess its own criminal power, from which an international law in turn could be developed, is also an idea one cannot dispute.<sup>5</sup>

It is instructive to recall the words of Professor Glueck, several months before the unconditional surrender of Germany, concerning the complexity of the issues which required speedy resolution:

With victory in sight, not the least perplexing question that will present itself to the United Nations is: What shall be done with the Nazi-Fascist war criminals?

The problems involved in answering this question are enormously complex. A rational and civilized approach to the issues presented must entail consideration of puzzling tangles of international and municipal law; of military and non-military law; of public policy on both national and international planes; of criminology and penology; of social psychology and social ethics.<sup>6</sup>

Lord Wright was particularly scathing in the following extract from his Introductory Chapter to the History of the United Nations War Crimes Commission:

One of the troubles of arriving at a definition of international law rules is that writers in their study, often removed from the realities of life, have expressed so many diverse views, which cannot be reconciled at all; but international law does not depend upon the irresponsible views of theoretical writers. It is to be found rather in international declarations, conventions, treaties, and practices of the nations, to say nothing of the moral consensus of human beings in the world, and the decisions of competent courts.<sup>7</sup>

In any consideration of the validity of 'Nuremberg Law', it is essential to draw a distinction between just and unjust wars. This theme will be examined later in this Chapter. It is a theme which has often been ignored by the critics of the Nuremberg process, because the recognition of the distinction reveals a fundamental flaw in the application of positivistic tenets to the solution of what was truly a legal, political and moral dilemma of

unexampled complexity and dimension in world history.

No useful purpose would be served by concluding the essential thesis of this study by merely adopting any of the divergent views which have been expressed concerning the legal validity of 'Nuremberg Law'. The content of some of the previous Chapters, as well as the citations above in this Chapter, demonstrate the impossibility of any reconciliation between those views. The author is not prepared to embrace any of the opposed opinions without qualifications.

For these reasons, it is emphasised that, as explained in Chapter 1, the thesis is written from the perspective of a trial lawyer, briefed to advise on the general validity of the London Agreement and Charter, the indictment and the Judgment of the International Military Tribunal. In doing so, we shall examine the major issues which the principal trial at Nuremberg raised for the ultimate judgment of a world which had been stricken by the most grievous and savage war in the history of mankind.

The focus of this Chapter will therefore be on whether or not twelve men, who were among the principal architects of the Nazi blitzkrieg, should have been sentenced to death and seven others sentenced to imprisonment for long terms.

In this discussion the author assumes only the role of a trial lawyer, without any inhibitions emanating from theoretical predilections. It was a case of guilty or not guilty, secundum allegata et probata.

## THE SOURCES OF INTERNATIONAL LAW

In the context of this study, an examination of the sources of international law is confined to a preliminary consideration of sources as expounded by jurists, international lawyers and scholars. The purpose is to reach a conclusion on the capacity of international law validly to be expanded in a manner analogous to common law doctrine and practice.

A classical exposition of the sources of international law, both general and particular, was the subject of a monograph by Sir Hersch Lauterpacht, republished in 1970.<sup>8</sup>

Lauterpacht examined the basis and objective sources of international law:

The basis—the primary cause—of international law is the fact of the existence of an international society composed of human beings organized as sovereign States. Its more immediate cause (or, as it is occasionally referred to, its objective source) is the interdependence, in its manifold manifestations, of these sovereign States; the need to safeguard their interests and their independent existence by means of binding rules of law; and the necessity to protect the individual human being who is the ultimate unit of all law ... The necessity of acting upon these causes by way of legal regulation is the objective source of international law in the sense that disregard of them must, in the long run, entail the disruption of the foundations of civilized life as well as the impairment of the reality of the law already established in the pursuance of those needs and interests.<sup>9</sup>

Lauterpacht argued that there are two principal agencies by which international law is expressed and made binding: first, individual sovereign States which create conventional international law by treaty or the aggregation of States which by uniform conduct furnish authoritative evidence of customary international law; second, the development of principles and rules of law 'which are due not to an ascertained direct expression of the will of States, but to the "reason of the thing"—which in this context means the existence of the international community—formulated in general principles of law.'

In the view of Professor Lauterpacht, the second of those sources is 'a expression of how of nature which nurtured the growth of international law and which assisted powerfully in its development.'<sup>10</sup>

He further argued:

... though the limited degree of usefulness of the distinction between the basis, the cause, the sources and the evidence of sources of international law is ... apparent, it is not devoid of value. The notion of

the source of law on the analogy of the source of a stream as the first external manifestation of an already existing, though inarticulate, body of law is particularly appropriate in the sphere of international law. It brings to mind the fact that the will of sovereign States, which is often regarded as the exclusive source of international law, is but the expression of an underlying objective reality. 11

So far as is relevant to 'Nuremberg Law', the essential postulate of Lauterpacht was thus expressed:

So far as the sources of international law are concerned the view which seems to be most in accordance with the practice of States and with the attitude of tribunals is that we must consider the objective reality of the international community as the primary source of international law; that sovereign States are the principal organs declaring, with constitutive effect, the rules of international law as a consequence and expression of that reality by means of custom and treaty; and that, in the absence of international law thus created and revealed, the rules and principles derived from the fact of the existence of the international community and formulated with the assistance of general principles of law--of the modern law of nature--must be regarded as one of the primary sources of international law.

While Lauterpacht recognised the hierarchy of sources of international law prescribed by Article 38 of the Statute of the International Court of Justice,<sup>12</sup> he went further in the cited paper when he endorsed the law of the London Agreement and Charter in these words:

Cases may occur--and the conduct of National-Socialist Germany during the Second World War confirmed that possibility--where the degree of transgression against the laws of humanity, which in any case are part of international law, is such as to call, as a compelling dictate of justice, for punishment, if necessary with retrospective effect, of crimes and atrocities.<sup>13</sup>

However, in the cited extract Lauterpacht did not, in the writer's opinion, take his argument as far as was necessary by adding as a requisite element for the validity of 'Nuremberg Law' the lawful authority of the Allied Powers, to which Germany had unconditionally surrendered, to legislate on the basis of their joint sovereignty over the former German Reich. That requisite element is discussed later in this Chapter.

A number of German scholars have in recent years enunciated concepts of the sources of international law which supplement, and in some cases depart from, traditional attitudes. Such concepts do not necessarily arise from 'Nuremberg Law' but appear to be consistent with its validity.

In an article essentially confined to customary law as one of the primary sources of international law, Professor Rudolph Bernhardt, under whose direction the Encyclopaedia of Public International Law has been published, discussed the novel question of 'instant' customary law. He wrote:

The question has been raised ... whether 'instant' customary law is possible; in other words, whether 'customary' law can be created spontaneously. This poses not only logical and semantic difficulties ('customary' law without 'custom?'). It also raises other important theoretical and practical problems. According to traditional concepts of customary law the possibility of 'instant law' must be denied. But one can imagine exceptional cases and situations in which such instant law is useful or even necessary. If, for instance, the community of States unequivocally and without any dissent considers certain acts, which have not been known before, to be illegal, the opinio juris might suffice even if no practice could evolve.<sup>14</sup>

It is a moot point whether or not the concept adverted to by Professor Bernhardt will obtain any significant recognition, but it bears in practice a similarity to 'Nuremberg Law' is prescribed in the London Agreement and Charter.

Professor Jochen Abr. Frowein developed a wide interpretation of jus cogens as a source of international law.<sup>15</sup> He expressed the view that the description of an 'international crime' in Article 19 of the International Law Commission draft on State responsibility 'clearly refers to the most important rules of jus cogens', including 'a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression.' (emphasis added). Although Professor



Frowein did not mention 'Nuremberg Law' expressly, it seems implicit in his evaluation of the doctrine of jus cogens:

The notion of jus cogens became essential for the understanding of international law at a time when it was again realized that the individual and arbitrary agreement of States could not be the highest value in the international community, and that the goal of preserving peace and protecting peoples and individuals presupposed the recognition of some basic values.<sup>16</sup>

Attention has already been directed to the dissenting opinion of Viscount Maugham in respect of the validity of 'Nuremberg Law' (Chapter 17). It is now necessary to examine the views he expressed in Chapter 6 of his cited work, entitled 'A Note on the Nature of International Law'.

Viscount Maugham asserted five propositions on which he based his disapproving judgment on the London Agreement and Charter:

'... it is generally recognized that except as the result of consent no new rule of international law can be imposed so as to have any binding force on a State merely by the will of other civilized States'.

'It is absurd to contend that a single act by (say) four States creates a custom, and therefore a law. The Law of Nations no doubt grows from time to time to meet a change in circumstances, and custom must have a beginning; but that fact does not lead to the conclusion that a suggested new rule, however desirable it may seem to be, can become a part of international law unless the consent of the nations as a whole has been obtained.'

He adopted in the context of 'Nuremberg Law' the statement of Sir Frederick Pollock that 'the final test of validity must in the case of international law, no less than in that of any other customary law, be found in general consent evidenced by conduct' (Cambridge Modern History, vol. II, p. 715).

'The Judges at the Tribunal at Nuremberg could not lay down a rule for the world, even if a duty to do so had been conferred upon it by the Moscow Agreement'. [The Tribunal did not pronounce a 'rule for the world'. It applied, in the trial of twenty two alleged war criminals, the law prescribed in the London Agreement and Charter].

'A rule punishing the authors of an aggressive war could only be enforced by the victors after and during the occupation' [it is submitted that this is precisely what the London Agreement and Charter achieved].

With all respect, we are constrained to reject the cited views of Viscount Maugham as irrelevant to a consideration of the validity of 'Nuremberg Law'. Expressive as they are of generalised opinions of root sources of international law, they ignore the two fundamental matters from which 'Nuremberg Law' derived its rational and lawful force: first, there is no rule that international law is incapable in a jurisprudential sense of development and application, after the fashion of the common law, in order to do justice in unique circumstances;<sup>18</sup> second, following the unconditional surrender of Germany and its complete collapse as a State, the Allied Powers possessed supreme legislative authority and exercised it.<sup>19</sup>

## THE LEGAL STATUS OF GERMANY AFTER ITS UNCONDITIONAL SURRENDER ON 8 MAY 1945

Two basic instruments determined the legal status of Germany after the Reich disintegrated by the beginning of May 1945. The first was the instrument whereby all German forces unconditionally surrendered to the Allied Powers at Rheims on 8 May. The document stated:

1. We, the undersigned, acting by authority of the German High Command, hereby surrender unconditionally to the Supreme Commander, Allied Expeditionary Force, and simultaneously to the Soviet High Command, all forces on land, sea, and in the air who are at this date under German

control.

2. The German High Command will at once issue orders to all German military, naval, and air authorities and to all forces under German control to cease active operations at 2301 hours (11.01 P.M.) Central European Time on 8 May and to remain in the positions occupied at the time. No ship, vessel or aircraft is to be scuttled, or any damage done to their hull, machinery or equipment.
3. The German High Command will at once issue to the appropriate commanders and ensure the carrying out of any further orders issued by the Supreme Commander, Allied Expeditionary Force, and by the Soviet High Command.
4. This Act of Military Surrender is without prejudice to, and will be superseded by, any general instrument of surrender imposed by, or on behalf of, the United Nations and applicable to Germany and the German Armed Forces as a whole.
5. In the event of the German High Command or any of the forces under their control failing to act in accordance with this Act of Surrender the Supreme Commander, Allied Expeditionary Force, and the Soviet High Command will take such punitive or other action as they deem appropriate. 20

The most legally significant term of the surrender instrument was paragraph 4, which anticipated the declaration, on 5 June 1945, of the instrument expressed to be 'regarding the defeat of Germany and the assumption of supreme authority with respect to Germany and supplementary statements' (commonly referred to as 'the Berlin Declaration of 5 June 1945'). A correct appreciation of the terms and legal effect of the Declaration is essential to a conclusion regarding the nature and scope of the authority which it legally conferred on the Allied and Associated Powers in the succeeding years. It is reproduced in Appendix 1. 21 The terms of the Declaration included the following preambular paragraph:

In virtue of the supreme authority and powers thus assumed by the four Governments, the Allied Representatives announce the following requirements arising from the complete defeat and unconditional surrender of Germany with which Germany must comply.

The most significant provision was Article 11(a), whereby 'the principal Nazi leaders as specified by the Allied Representatives, and all persons from time to time named or designated by rank, office or employment by the Allied Representatives as being suspected of having committed, ordered or abetted war crimes or analogous offences, will be apprehended and surrendered to the Allied Representatives'. There was no definition or specification of what acts or omissions constituted 'war crimes or analogous offences'. 22

For the purposes of occupation, the Declaration provided for the division of Germany, within its frontiers as they existed on 31 December 1937, into four zones, each under a Commander-in-Chief designated by the responsible Power. The Declaration contained a detailed statement on control machinery in Germany. It expressly acknowledged that the 'assumption of authority did not effect the annexation of Germany'. The Declaration concluded: 'The governments of the four Powers hereby announce that it is their intention to consult with the Governments of other United Nations in connection with the exercise of this authority.'

An important practical element in the circumstances relevant to the scope of the 'supreme authority' of the Allied Powers in accordance with the Berlin Declaration was the collapse, in all practical terms, of the German Government. Grand Admiral Donitz had been appointed by Hitler in a 'political testament' his successor. Donitz assumed the leadership of the German folk on the evening of 1 May 1945, as Head of State and commander in Chief of the armed forces. 23 His last speech to the German people was on 8 May, when he announced the unconditional surrender. shortly afterwards, Reichsfuhrer SS Heinrich Himmler committed suicide. Donitz was obviously embattled. On 23 May, Donitz, Jodl and another high-ranking officer, pursuant to an order of the Allied Control Commission, met Allied officers. They were told:

[General Rooks, U.S. Chief of the Commission]: I am in receipt of instructions from Supreme Headquarters, European Theatre of Operations, from the Supreme Commander, General Eisenhower, to call you before me this morning to tell you that he has decided, in concert with the Soviet High Command, that today the acting German Government and the German High Command, with the

several of its members, shall be taken into custody as prisoners of war. Thereby the acting German government is dissolved ...<sup>24</sup>

There were thus four elements which co-existed on the date of the execution of the London Agreement and Charter on 8 August 1945.

- (a) The fact that the German Reich had surrendered unconditionally to the Allied Powers. In argument relating to the criminality of groups or organisations, Mr. Justice Jackson submitted to the Tribunal:

The unconditional surrender of Germany created for the victors novel and difficult problems of law and administration. Being the first such surrender of an entire and modernly organised society, precedents and past experiences are of little help in guiding our policy toward the vanquished. The responsibility implicit in demanding and accepting capitulation of a whole people certainly must include a duty to discriminate justly and intelligently between the opposing elements of that population, which bore dissimilar relations to the policies and conduct which led to the catastrophe.

...

The primary objective of requiring that the surrender of Germany be unconditional was to clear the way for a reconstruction of German society on such a basis that it will not again threaten the peace of Europe and of the world.

...

This Charter is the plan adopted by our respective governments and our duty here is to make it work. <sup>25</sup>

- (b) The fact that the acting German government, irrespective of its dubious legality even under German national law, had been dissolved, with the consequence that there was no government in Germany other than the Allied Control Council. <sup>26</sup>
- (c) The Berlin Declaration of 5 June 1945, by Article 11, expressly contemplated the trial of Nazi war criminals, without any express reliance on the Moscow Declaration of 30 October 1943 or any other Allied pronouncement.
- (d) It is notorious that the German Reich was substantially in a state of physical ruin, which was accompanied by deprivation, hunger, social dislocation and the resentment and anger of most of the German people in the wake of the collapse of the National Socialist policies which they had espoused.

It is obvious that the solution to the problems created by those four elements could only have been determined by political decisions.

What were the alternatives?<sup>27</sup> In retrospect, it appears that there were four:

First, 'political execution', that is the execution, as a result of a political decision, of an arbitrarily determined number of German political, military and industrial leaders, immediately following apprehension and identification. This course was advocated by Churchill and many others. Had it been adopted, there can be no doubt that it would have been condemned within a short time and by future generations as just as reprehensible as some of the policies of the Nazi regime. Above all, it would have been characterised as a 'lottery in death' to the shame of the Allied Powers.

Second, the course advocated by Great Britain, in particular by Lord Simon, that a 'document of Arraignment' be served on Hitler and his associates, who would be given the opportunity of disputing the truth of its contents before an inter-allied judicial tribunal, with power reserved to the Allies to determine punishment if the Arraignment was not disproved. The writer finds it difficult to identify any saving grace whatsoever in the adoption of this course, which combined all of the most unacceptable jurisprudential concepts and lacked any redeeming feature (see Chapter 6).

Third, the Nuremberg trial could have been confined solely to war crimes *stricto sensu*, with very little

difference in the ultimate result. It is idle to suggest that such a course would have satisfied public opinion, at least in Great Britain, America and other Allied countries. It would have been a tame finale to the declarations of retribution by the Allied Powers. It would have demonstrated intrinsic impotence in the jurisprudence of international law. In practical terms, it would have invited mass reprisals against a host of German individuals, and it would seem that, of those indicted at Nuremberg, Hess, Streicher<sup>28</sup> and von Schirach would have gone free. Most important of all reasons, for the future, against omitting crimes against peace from the London Charter was that such crimes would have been seen to be ignored after the most disastrous war in world history and the concept would have vanished into oblivion so far as the jurisprudence of international law was concerned.

Fourth, the only lawful, just and proper course was the execution of the London agreement and Charter by the four Allied Powers in the exercise of what the Tribunal termed 'the sovereign legislative power by the countries to which the German Reich unconditionally surrendered and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world'.

In the circumstances which have been outlined supra, the author's submission, at the heart of this study, is that the London Agreement and Charter were a valid legislative prescription for the Nuremberg trial of major German war criminals. Unfortunately a proper perspective of those instruments has been obscured by the writings of some academic and other international lawyers and, most importantly, by the judgment of the International Military Tribunal when it went beyond its Charter and attempted to defend the proposition that the Charter was an 'expression of international law existing at the time of its creation.' <sup>29</sup>

The tribunal itself created the forensic structure for the cited obiter pronouncement and the subsequent development of it in its judgment, when it stated, on the second day of the trial:

A motion [see Chapter 17, Appendix I] has been filed with the tribunal and the Tribunal has given it consideration, and insofar as it may be a plea to the jurisdiction of the Tribunal, it conflicts with Article 3 of the Charter and will not be entertained. Insofar as it may contain other arguments [ex post facto legislation and the maxim nullum crimen sine lege] which may be open to the defendants, they may be heard at a later stage. <sup>30</sup>

The Tribunal did in fact subsequently hear extensive argument from counsel relevant to the two legal issues cited above, and stated:

The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it is therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement. But in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defence, and will express its view on the matter. <sup>31</sup>

It was not at the insistence of the prosecution that the Tribunal made its obiter pronouncements. Thus, in his closing address, Mr. Justice Jackson said:

At this stage of the proceedings, I shall rest upon the law of these crimes as laid down in the Charter. The defendants, who except for the Charter would have no right to be heard at all, now ask that the legal basis for this trial be nullified. This Tribunal, of course, is given no power to set aside, or to modify the Agreement between the four Powers, to which eighteen [sic] other nations have adhered. The terms of the Charter are conclusive upon every to these proceedings. <sup>32</sup> (emphasis added)

A convenient starting point for consideration of the validity in law of the London Agreement and Charter is the following proposition advanced by Professor Julius Stone:

In the final resort, the trials, convictions and punishments under all the counts of the Nuremberg Charter have a technically sound legal basis in the powers of the victor States over the defeated German State and its soldiers, ministers and nationals, that State having unconditionally surrendered, and as to the count for violations of war-law stricto sensu, it was also legally well based on the traditional

right of each belligerent to try violators, regardless of nationality, in its own tribunals.<sup>33</sup>

That fundamental thesis of Professor Stone expressly excluded any merit in defence arguments based on *ex post facto* law or the principle of *nullum crimen sine lege*. He asserted that there was no rule of international law which sustained either argument.<sup>34</sup> There is an impressive bibliography which supports the view of Professor Stone, to some of which reference should be made.<sup>35</sup>

In the writer's view, Professor Kelsen convincingly demonstrated the legal right of the Allied Powers to enter into the London Agreement and Charter:

This [the assumption by the Allied Powers of supreme authority] means that the German territory, together with the population residing on it, has been placed under the sovereignty of the four Powers. It means further that the legal status of Germany is not that of 'belligerent occupation' in accordance with the Articles 42 to 56 of the Regulations annexed to the Hague Convention respecting the Laws and Customs of War on Land of 1907. After Germany's unconditional surrender and especially after the abolition of the last German Government, the Government of Grand Admiral Doenitz, the status of belligerent occupation has become impossible. This status presupposes that a state of war still exists in the relationship between the occupant state and the state whose territory is under belligerent occupation. This condition implies the continued existence of the state whose territory is occupied and, consequently, the continued existence of its government recognised as the legitimate bearer of the sovereignty of the occupied state.<sup>36</sup>

Professor Kelsen rejected as untenable the doctrine--and did so logically and correctly, it is submitted--that before the Allied Powers could legally be regarded as having sovereign authority in Germany its annexation was a prerequisite, a situation which those Powers had expressly disclaimed in the Declaration of Berlin. His reasoning led to the conclusion that the nature of the sovereignty exercised by the Allied Powers was that of condominium, which embraced unrestricted legislative, judicial and executive powers. The unrestricted legislative power of the occupants is practically the only possibility of creating an adequate legal basis for the prosecution of German war criminals, which neither international law nor the existing municipal laws of Germany or of any of the United Nations provides.'

The cited view with respect to the unlimited scope of the legislative authority of the Allied Powers, as reflected in the London Agreement and Charter, is consonant with the policy implemented by the Allies immediately after they entered Germany in September 1944. By a series of Proclamations, Laws and Ordinances, the Supreme Commander, General Eisenhower, established Military Government Courts and suspended the functioning of all German Courts within the occupied territories. The first Proclamation announced the vesting of supreme legislative, judicial and executive authority within the occupied territories in General Eisenhower as Supreme Commander of the Allied Expeditionary Forces and as Military governor. the purpose of the Proclamation was thus expressed:

The Allied Forces serving under my command have now entered Germany. We come as conquerors but not as oppressors. In the area of Germany occupied by the forces under my command we shall obliterate Nazism and German Militarism. We shall overthrow the Nazi rule, dissolve the Nazi Party and abolish the cruel, oppressive, and discriminatory laws and institutions which the Party has created. We shall eradicate that German Militarism which has so often disrupted the peace of the world. Military and Party Leaders, the Gestapo, and others suspected of crimes and atrocities will be tried and, if guilty, punished as they deserve.

... Military Government Courts will be established for the punishment of offenders.<sup>37</sup>

Although Professor Quincy Wright expressed his ultimate view that 'the derivation of the Tribunal's jurisdiction from the sovereignty of Germany ... appears to be well grounded', his exposition of the relevant law is not, in the author's opinion, as incisive as that of Professor Kelsen. this criticism applies particularly to the discussion of the question of annexation, which appears to be somewhat confused. Nevertheless, the following statement of Professor Wright is considered to be correct:

In principle it would appear that if a State or States are in a position to annex a territory they have the right to declare the lesser policy of exercising sovereignty temporarily for specified purposes with the intention of eventually transferring the sovereignty to someone else [or, it should be added, relinquishing the sovereignty]. This appears to be the proper construction of the Declaration of Berlin.<sup>38</sup>

It was, of course, necessary for the Allied Powers to await the establishment of a democratic system of government in Germany and the emergence of a stable social order, before it was prudent to relinquish their sovereignty. The first step in those processes did not occur until the promulgation of the new constitution of the Federal Republic of Germany (the Basic Law) on 23 May 1949. It was not until 5 May 1955 that the Paris Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany came into force, thus terminating the occupation of the Western zones of occupation in Germany. The termination had been reached in stages. In the Eastern (Soviet) zone the occupation was also progressively concluded. Thus, for a decade, the occupation of the former Reich was sustained, at least in part (ignoring the complex situation in the 'special Berlin area'), and this fact does not give credence to the many theories advanced by German writers with respect to the precise legal character of the total Allied occupation which began on 8 May 1945.<sup>39</sup>

In the writer's view it is not realistic to suppose that the reconstruction in all respects of Germany could have been accomplished in the circumstances which existed unless full legislative authority had been assumed by the Allied Powers as a concomitant of sovereignty. Once the Allied Powers established, according to the unprecedented circumstances, a regime based on their supreme legislative power—and it is submitted they did so by the four-Power Declaration of Berlin following closely on the unconditional surrender of Germany—they were entitled to exercise their sovereignty without constraints other than any which were dictated by rules or principles of justice soundly based in international custom and approved almost universally by civilised countries.

In the discussion earlier in this Chapter of the sources of international law, reference has been made to some of the views expressed by Sir Hersch Lauterpacht. On the consequences of the unconditional surrender of Germany and the provisions of the Declaration of Berlin, Lauterpacht wrote:

The method of putting an end to hostilities by way of 'unconditional surrender' instead of the customary armistice agreements was adopted at the end of the Second World War largely in order to make it possible for the Allies to avoid the conclusion of agreements with the Governments responsible for the initiation and the lawless conduct of the war of aggression and so assist indirectly in the perpetuation of regimes the complete abolition of which had been proclaimed to be among the principal purposes of the War.

... It would thus appear that while an ordinary armistice— even if dictated by the victor—is still in the nature of an agreement signed by both sides and laying down exhaustively the rights and obligations arising thereunder, this is not the case with regard to an instrument of unconditional surrender. In the latter there is no legal limit set to the victor's freedom of action—save the implied obligation not to resume hostilities if all his conditions and orders are complied with. These orders may include the total suppression of the Government of the defeated State, as was in fact the case in relation to Germany.<sup>40</sup>

One of the difficulties in appreciating the dissenting views of many writers on 'Nuremberg Law' is their failure to recognise that political reality and power politics are dominant features of international life. Such considerations were crucial in determining American policy in the months before the unconditional surrender of Germany. In a memorandum dated 29 December 1944 (see Chapter 6) from Assistant Attorney-General Wechsler to Attorney-General Biddle (later the senior American member of the Nuremberg Tribunal) it was stated:

The problem, moreover, is not a legal problem in any genuine sense since under international law the victors may determine the terms of peace. <sup>42</sup>

The Allies acted precisely in the manner suggested in that memorandum. they insisted on the unconditional surrender of Germany; they entered into the Declaration of Berlin; and they exercised plenary legislative authority. The trial at Nuremberg was no more than the application of the product of that authority to the facts as pleaded, which were substantially unchallenged. In the absence of an international legislature and an

international judicial organ, it is not possible to visualise any other acceptable process than that which was put into effect at Nuremberg.

A number of writers on 'Nuremberg Law' have argued that the Hague Regulations of 1899 and 1907 operated to restrict the nature of the legislative authority of the Allied Powers as occupants of Germany and to require that at least some of the recognised rules of international law in respect of belligerent occupation were applicable. 43 Professor Schwarzenberger rejected this view, although not expressly on the basis of Germany's unconditional surrender and the provisions of the Declaration of Berlin. He stated:

The experiences of the Second World War made abundantly clear the inadequacy of Section III of the Hague Regulations of 1907 when applied to mid-twentieth-century warfare. Allied occupation authorities in Africa, Asia and Europe found little guidance in these Regulations on how to feed, clothe and house the populations abandoned by their former masters. Moreover, as was put on record in the Judgments of the International Tribunals of Nuremberg and Tokyo, the outrages committed in the occupied territories by the aggressors were such as to necessitate a more articulate and elaborate reformulation of the minimum standards of civilisation. If civilised nations could relapse so quickly into barbarism, very much less could be taken for granted henceforth than had been assumed by the draftsmen of the Regulations of 1899 and 1907.<sup>44</sup>

However, the opinion is advanced that it is necessary to project Professor Schwarzenberger's cited view much further. Such a process involves the assertion that the correct rationale of the London Agreement and Charter was the lawful capacity of the Allied Powers, in view of their sovereign positions, to prescribe legal rules which reflected the expectations of civilised countries, in the light of all the circumstances, in a manner analogous to the development of the common law.

it should be acknowledged that Professor Schwarzenberger qualified his earlier statement when he wrote:

The government of a belligerent may wish to avoid *debellatio*, but be unable to secure an armistice. It may, however, be in a position to secure its offer of unconditional surrender. Unless the victor accepts reservations made in the offer of 'unconditional surrender', the defeated party consents thereby in advance to any departures from, for instance, the law of belligerent occupation, which the Occupying Power may deem necessary. In such a case, the only limitations of the victor's discretion which are probably implied, under international customary law, in accepting surrender on such terms are those imposed by the standard of civilisation, for it would be difficult to imagine that even a victorious Power would wish to reserve its freedom to act in a barbarous manner.<sup>45</sup>

The theme of the justice of questioning the adequacy of the Hague Regulations to regulate the rights of occupants of the territory of a state which had embarked on a planned campaign of aggressive warfare was one of the keynotes in an article by Professor Korovin shortly after the end of World War II. He wrote:

The new legal aspect of war as a means of self-defense developing into international action against aggression places on a new plane all the problems of war and its so-called laws and customs. For example, can persons be considered guerrillas as defined by the Fourth Hague Convention, if, even though they meet the formal requirements of the Convention, they act voluntarily on the side of the aggressor or are accomplices in his crimes?

Further, can we demand observance of the Hague rules of military occupation (respect for the sovereignty of the local government and so on) in the event of the occupation of the territory of an aggressor state by troops of peace-loving nations? Or can we permit the thought that in such a case the occupation army would provide armed protection for those same reactionary social forms and political institutions which led the country on the path of international crime?

And, conversely, can we confine a sacred people's war against an aggressor and enslaver, a heroic struggle of millions of people for their country's independence, for its national culture, for its right to exist, can we confine this war within the strict bounds of the Hague rules, which were calculated for wars of a different type and for a totally different international situation?<sup>46</sup>

Writing in January 1944, Professor Lauterpacht foresaw the inadequacy of the Hague Conventions rules in his review of the work of E.H. Feilchenfeld on the economic law of belligerent occupation.<sup>47</sup> Professor Lauterpacht directed attention to the manner in which that branch of international law 'has been ruthlessly disregarded by the Power [that is, Germany] which in the first stage of the World War has been the principal occupant of enemy territory'. He added;

How far has this wholesale violation of the existing law been due to the weaknesses of the rules codified in the Hague Conventions? How far has that disregard of the law been due to the failure of the signatories of those Conventions to adapt them to the changed conditions of modern and total war in a period of increased State control over economic life? The existing law is probably in many respects in need of revision and clarification.

... There is nothing in the comprehensiveness of total war which compelled Germany to abandon one of the basic principles of the law of belligerent occupation, namely, that the occupant does not acquire sovereignty over the territory, and that its annexation pendente bello and the subjection of its inhabitants to the allegiance of the occupant is utterly unlawful. Yet this has been the practice of the German Government on a wide scale. In pursuance of that practice, the German Supreme Court, in a decision given in September 1941, held that the Polish State had ceased to exist and that Polish nationals in territories not annexed by Germany or Russia had become Stateless persons.<sup>48</sup>

In this author's view, it is ironical in the extreme that German writers such as Dr. Laun (see footnote 43) should assert the applicability of the Hague Rules to the Allied occupation of Germany after the wholesale disregard by the Third Reich of those Rules in its waging of a Blitzkrieg of aggression.

During the currency of the trial at Nuremberg, Professor Schwarzenberger's review of the work of Dr E. Fraenkel on the Rhineland occupation, 1918-1923, was published. <sup>49</sup> Professor Schwarzenberger compared the circumstances in the Rhineland with those in Germany after 8 May 1945. He wrote:

Today, the position in Germany is entirely different. In the first place--and this applies to all other countries which have unconditionally surrendered--the unconditional surrender of Germany means a renunciation of the protection which, otherwise, the defeated enemy might derive from the customary and conventional rules applicable in time of war. Secondly, there is no more a German Government. The defeat of Germany ended with debellatio, and the occupying States jointly exercise sovereignty within the borders of what once was Germany. It has thus become impossible to speak of any legal limitations restricting the untrammelled discretion of the Powers in occupation of Germany. Yet if these States claim to represent world civilization, they will have to limit themselves in obedience to standards inherent in the idea of civilization, and, in particular, of Western civilization.<sup>50</sup>

Professor Schwarzenberger asserted that one of the most significant standards of Western life was the rule of law, and that, as used in the book he was reviewing, the rule of law meant that 'bearers of public power respect definite rules of jurisdiction and procedure in their governmental and administrative activities--that they recognise those formal principles that are indispensable for the protection of the individual from arbitrary interference with his personal integrity'.

At this stage it is convenient to examine some of the dissenting views with regard to the fundamental proposition that the London Agreement and Charter were the product of the 'sovereign legislative power' of the four nations in whose names the instruments were executed. In the author's view, such dissent has in the main been created on false premises and confused perceptions. Some examples will be given.

Dr C.A. Pompe, in what the author considers is a confusing exposition, appears to have been more concerned in attacking the Tribunal's expressions in its judgment rather than in asserting the legal invalidity of the Agreement and Charter.<sup>51</sup> It is necessary to reproduce an extract from Dr Pompe's work verbatim, in order to illustrate the writer's statement:

If there existed on the part of the occupying countries 'sovereign legislative power' over Germany, this was not in consequence of the unconditional surrender of the Reich, but of the assumption of 'supreme authority' by the Four Allies, embodied in the Declaration of Berlin, June 5, 1945. Whatever may be



the outworn doctrine of debellatio (to which the Tribunal seems to adhere), it is certainly a postulate of common sense that there can be no government without the consent of the governing [emphasis added in the original]. Before the Declaration mentioned, no authority of the Allies existed in Germany, only de facto power. The authority assumed was, however, exclusively exercised in the name of their respective governments by the Supreme Commanders of the Four Nations, and, since the Potsdam agreement, for the whole of Germany jointly by these Commanders as Members of the Allied Control Council. It was not exercised by the representatives of the Four Power of the London Conference. This difference of functions is demonstrated beyond all doubt by the later enactment of Law No.10 by the Allied Control Council indeed as an exercise of legislative power over Germany 'in order to give effect to the terms of the ... London Agreement' ... 'to establish a uniform legal basis in Germany for the prosecution of war criminals'. The London Agreement was a proper international legal instrument concluded in accordance with United Nations Declarations - not restricted to the leading Powers--and 'in the interest of all the United Nations'.<sup>52</sup>

It is difficult to appreciate the distinction made by Dr. Pompe between the London Agreement and Charter, construed together, and Control Council Law No. 10. If the latter instrument was 'indeed an exercise of legislative power over Germany', as Dr. Pompe asserted, the question arises why the London Charter was 'different'. Moreover, the London Conference (of June and July 1945) did not exercise authority. The discussions at the Conference were preliminary to the execution of the Agreement and Charter. Further, Dr. Pompe did not mention in the cited passage the fact that there was no national government in existence in Germany.

The cited passage also appears to be inconsistent with the statement by Dr. Pompe in his Introduction:

Though before Nuremberg no rule existed making aggressive war a crime for which individuals could be punished, there was nothing unlawful] or unjust in the punishment of the Nazi leaders who launched the Second World War. Resort to aggressive war had been forbidden and condemned in a basic and unequivocal rule of international law. And the Nuremberg Tribunal established beyond any doubt that aggressive war had been resorted to not as a sudden national reaction on international events, but after years of careful and deliberate planning and preparation. The Tribunal, recognizing this grave violation of the fundamental rule of international law as having all the essentials of criminality, was justified in punishing its authors in the name of the offended world community ... 53

Reference has been made in Chapter 17 to the views of Viscount Maugham and Lord Hankey. They are of limited relevance in the present context, but should be stated.

As appears from the text of Chapter 17, Lord Hankey's criticism of the Nuremberg trial process, and of the continuation of war crimes trials, was based on three principal arguments.

First, apparently invoking the et tu quoque concept, Lord Hankey argued that the principal Allied European Powers had 'for centuries ... committed technical aggressions'; the question naturally arises as to whether Lord Hankey really considered that the aggressive acts of the leaders of the Third Reich, as pleaded in the indictment, were 'technical' aggressions.

Second, Lord Hankey was critical of the Allied demand that Germany should surrender unconditionally. His argument, to which the author has referred in Chapter 17, appears specious and biased.

Third, Lord Hankey asserted that the defendants at Nuremberg were tried 'on a crime' created by ex post facto legislation. This argument is considered later in this Chapter.

The writer's opinion is that Lord Hankey's unrestrained criticism of the Nuremberg process, which reached its peak in his condemnation of Mr Churchill,<sup>54</sup> should be attributed to political motives rather than to legal considerations.

It is only necessary to add to the discussion of the views of Viscount Maugham in Chapter 17 a brief reference to the Preface he wrote to Brigadier-General Morgan's book, The Great Assize.<sup>55</sup> In his extreme criticism of the Nuremberg process in that Preface, Viscount Maugham did not analyse the facts relating to the legal status of Germany at the date of the execution of the London Agreement and Charter, but, like Lord Hankey, his criticism was essentially directed against the Tribunal:

... his [Brigadier-General Morgan's] criticisms of the dicta ... in the Judgment, so far as it seeks by obiter dicta to justify its decisions on existing rules of International Law are of great weight. For my part, I think his criticisms are unanswerable; and I much regret that the Tribunal, being a military tribunal appointed for a special purpose, thought fit to travel outside its jurisdiction.<sup>56</sup>

As the writer will argue, Viscount Maugham's criticism of 'Nuremberg Law' is fallacious, as it does not distinguish between two discrete issues: first, the legal integrity of the provisions of the London Agreement and Charter; second, the extent to which the Tribunal considered matters upon which it was not necessary for it to embark.

The views of Professor G.A. Finch, Editor-in-Chief of the American Journal of International Law, have been discussed in Chapter 17 in a limited context. Although he considered that only Count 3 (war crimes) and Count 4 (crimes against humanity) had a sound legal basis, Professor Finch did not question the general sovereign legislative authority of the Allied Powers. Thus:

With the unconditional surrender of Germany, its government went out of existence as a sovereign state and its sovereignty is now held in trust by the condominium of the occupying Powers ... The International Military Tribunal was established after consultation with the Allied Control Council which exercises supreme authority in Germany.<sup>57</sup>

Not all authors, including German authors, adopt a definitive interpretation of the legal rules which constrain the administrative authority of an occupying Power, or of a number of co-belligerent Powers, in occupation of former enemy territory. J.M. Mössner traced the transition in this respect from the classical period of international law, in which no restrictive rules existed at all, to the development at the beginning of the 19th century 'that a distinction must be drawn between the situation before and after debellatio. Military occupation before debellatio was ... deemed to be only a provisional administration of the territory'. As Mössner states:

This rule gradually found acceptance in the practice of States and was finally incorporated into the Hague Regulations of Land Warfare (Articles 42 and 56). After debellatio, however, when the animus revertendi of the former sovereign was extinguished, the invading State was permitted to annex the territory.<sup>58</sup>

After referring to Articles 43, 45, 46, 49 and 56 of the Hague Rules, Mössner stated: 'These rules are very general and do not take into consideration specific situations.'<sup>59</sup>

In order to complete our brief survey of the action taken by the Allied Powers pursuant to their assumption of supreme authority with respect to Germany, it is necessary to refer to the agreements reached at Potsdam, near Berlin, when Stalin, Truman and Churchill (succeeded from 18 July 1945 by Attlee) met for the last major war conference between 17 July and 2 August 1945. The agreements are contained in two documents: A report on the Conference published immediately and a Protocol of the Proceedings of the Conference published in 1947 by the British and United States Governments. France, although a member of the Control Council, was not represented at the Conference. The discussions at the Conference ranged over many issues, including 'the establishment of a Council of Foreign Ministers, the political and economic principles to govern the treatment of Germany in the initial control period, reparations, the disposal of the German Navy and Merchant Marine, the City of Königsberg and the adjacent area, war criminals, the western frontier of Poland, and the orderly transfer of German populations.'<sup>60</sup>

Professor Frowein has summarised the political principles embodied in the Agreements as follows:

Complete disarmament, demilitarization, and elimination of the National Socialist Party and its institutions on the one hand and reconstruction of German political life on a democratic basis on the other. No central German government was to be established 'for the time being', but 'certain essential central German administrative departments' were to act under the direction of the Control Council.<sup>61</sup>

Although the Potsdam Agreements were not initially treated as international treaties in a formal legal sense, as Frowein has demonstrated,<sup>62</sup> nevertheless subsequent developments established that the parties regarded them as

binding international legal agreements.<sup>63</sup>

The disintegration of the four-Power alliance within three years of the Potsdam Agreements has meant that there has never been a peace settlement with Germany, although there has been adherence to the territorial sovereignty agreements which were reached at Potsdam. However, there is lingering uncertainty, even nearly 45 years after the unconditional surrender of Germany, concerning the existing status of sovereignty within the Federal Republic of Germany. The issue created considerable public concern in the Republic following the air-show tragedy at the United States base at Ramstein in September 1988. An indication of Germany's position is given in an article by Karl Feldmeyer in the *Frankfurter Zeitung*, 5 September 1988, which is reproduced in Appendix II in an English version.

In the writer's view the nature and permissible extent of the authority of the occupying powers when the London Agreement and Charter were executed may be more clearly discerned in the provisions adopted at Potsdam than in those relating to the trial of twenty four alleged German war criminals. The Potsdam Agreements are facts. They bind the States by which they were concluded, and France as well, to the extent to which that country consented to them.<sup>64</sup>

## Conclusion

As has been indicated in this Chapter (*supra*, *passim*), the writer's view is that the London Agreement and Charter, which alone prescribed the law in accordance with which the Nuremberg indictment was tried, were a valid exercise of legislative authority vested in the four Allied Powers by virtue of their sovereignty over Germany in the circumstances which have been discussed. It is true that in order to give that exercise of legislative authority the imprimatur of justice and fairness as practised by civilised countries, the legislative provisions should not have exceeded in severity as against the accused the standards of conduct in war which had gained, or were capable, once formulated, of receiving the approbation of a highly preponderant proportion of those countries. These qualifications were fulfilled.

If the Nuremberg Tribunal had rested its judgment on its assertion, which was correct beyond argument, that the law of the Charter was 'decisive and binding' on it, as Mr Justice Jackson (see this Chapter, footnote 32) urged it to do and as Sir Hartley Shawcross also argued,<sup>65</sup> much of the disputation concerning the Nuremberg trial would have been avoided.

In recognising the legally binding character of the Charter, the Tribunal did not attempt to find the facts and propound the legal consequences of the facts, relating to the legal status of Germany at the time the London Agreement and Charter were executed. If it had done so, it may well have avoided the *obiter* pronouncements concerning the *existing* state of international law with regard to Crimes against Peace, and thereby withheld from some writers the opportunity to criticise it for having gone outside its jurisdiction. In that respect, the writer is bound to concur with Viscount Maugham's criticism (see this Chapter, *supra*). The situation is the more difficult to understand because the Tribunal was clearly of the view that, as it stated, the London Agreement and Charter were the expression of the *sovereign legislative authority* of the four Allied Powers.

The writer is unable to avoid the conclusion that, for reasons either of compromise or in order to answer critics, the Tribunal felt it necessary to support the validity of such authority by an *obiter* examination of existing international law and was thereby led to the view it expressed that the Pact of Paris was in itself a basis for the definition of 'Crimes against Peace' in paragraph 6(a) of the Charter.<sup>66</sup> It is later argued that the Pact of Paris was merely one factor in stamping as just and fair the prescriptive provisions of the Charter. The *obiter* reasoning of the Tribunal, which was marked by extremely sparse citation of authority,<sup>67</sup> was not convincing, in the writer's respectful view, and weakened the juridical force of the judgment. Further, although the Tribunal referred to the capacity of international law to expand in a manner analogous to the development of the common law, it did not emphasise that jurisprudential reality, but, rather, obscured it by its concentration on the effect of the Pact of Paris.<sup>68</sup> The writer expresses the same view regarding the insistence of Lord Wright, in passages cited *supra*, that the provisions of the Charter concerning 'Crimes against Peace' were merely a recognition of *existing* international law.

When the Tribunal, on the second day of the trial, as stated *supra*, gave its ruling on the preliminary defence motion (Chapter 17, Appendix I), it virtually invited defence counsel to raise the issues which they later argued unsuccessfully. Thereby the Tribunal depreciated its judgment that the Charter was decisive and binding on it.

In the next section of this Chapter the writer considers the analogy, so far as international law is concerned, of the development of the common law.

## THE ANALOGY OF THE DEVELOPMENT OF THE COMMON LAW

... the crime against the peace undoubtedly rests directly upon international law ... It is immaterial whether the Charter and the Judgment of Nuremberg created new international law or whether existing international law has only been clarified. At any rate, the direct effect of international law on the individual implies a welcome weakening of the sovereignty of the individual states. Only by the removal of this . sovereignty can a collective order be created which guarantees to all states and men security and peace.

(Dr. Karl-Heinz Lüders, Regierungs-Direktor in the Ministry of the Interior of the German Federal Republic in Bonn, 'The Nuremberg Judgment', Nuremberg: German Views of the War Trials, edited by Benton and Grimm, Southern Methodist University Press, Dallas, 1955, pp. 131-132).

It is of interest and significance that Dr. Lüders, who held a senior administrative legal office in the German Government in 1955, should have strongly defended the validity of the Nuremberg process and at the same time recognised the 'development of a complex of common law in international law'. He stated:

Independent of general international law, we Germans cannot raise any objections against these proceedings--from the legal standpoint-- because with the unconditional surrender we have agreed to all measures of the Allies which are compatible with the commandments of humanity and that part of the principles of international law which is indispensable as a moral minimum.<sup>69</sup>

In order to evaluate the capacity, within the body of international law, for the application of rules and principles in a manner analogous to the development of the common law, it is necessary to consider the views of writers of acknowledged soundness, as well as judicial authority.

In one of a series of lectures delivered to the Law Schools of several American universities in 1903, Sir Frederick Pollock referred to 'the other great cosmopolitan offshoot of the Law of Nature, namely international law' and rejected the views of what he termed 'the so-called analytical school' for 'not allowing the law of nations to be truly law at all'. He stated:

It is said that a system of rules cannot be law when it lacks the sanction of a tribunal and of regular decisions; and the view that international law depends merely on convention (which Lord Stowell declared to be fit only for Barbary pirates) may be found not only in text books, but in reported judgments given in cases of great importance. I do not admit the validity of the argument, if the fact were as alleged; but the supposed fact is in truth subject to large exceptions. Not only international questions of allegiance and territorial jurisdiction, of the existence and consequences of war between foreign powers (whether officially recognized as sovereign states or not), of blockade and its incidents, and the like, may be and frequently have been the subjects of decision in municipal courts; but a material part of the law of war, namely the law of prize, has been administered, and still may be, by courts of admiralty, and expressly as an international and not as a local law. Prize courts administer the law of nations and have never purported to administer anything else. "The seat of judicial authority is locally here, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality." This is only a sample of Lord Stowell's utterances.<sup>70</sup>

Sir Frederick Pollock asserted that it was beyond doubt that Lord Stowell conceived himself to be administering a law that was jus gentium in the fullest sense, a rule not of local but of universal obligation. He added:

The same view has been consistently held and applied in the Supreme Court of the United States; I

should rather think, indeed, that American jurists regard it as elementary. Thus although it is true that for some parts of the law of nations there is at present no tribunal, or none with coercive jurisdiction, it is equally true that a considerable part of it is actually within the sphere of positive jurisprudence.<sup>71</sup>

An authority frequently cited is that of the United States supreme Court in New Jersey v. Delaware 291 U.S. p.361. Although the issue involved a civil matter--the situation of the true boundary between the two States in the absence of any treaty or convention and no conduct or other act of dominion by either State to give the boundary a practical location--the opinion of the Court, delivered by Mr Justice Cardozo, stated the following general principles:

The capacity of the law to develop and apply a formula consonant with justice and with the political and social needs of the international legal system is not lessened by the fact that at the creation of the boundary the formula of the Thalweg had only a germinal existence. The gap is not so great that adjudication may not fill it. ... International law, the law that governs between States, has at times, like the common law within States, a twilight existence during which it is hardly distinguishable from morality or justice, till at length the imprimatur of a court attests its jural quality. The gradual consolidation of opinions and habits has been doing its quiet work.' (Vinogradoff, Custom and Right, p. 21).<sup>72</sup>

In academic literature there has been a surprising reluctance on the part of authors to recognise the potentiality of international law to develop and apply expanded concepts in the same way as the common law has done for centuries. However, Professor Woetzel, writing in 1960, stated:

It has been shown that international law advances from case to case much like the common law. Some authors have maintained, therefore, that regardless of whether there exist precedents or codified provisions in international law to conclude that a certain crime is an international delict an international court can interpret international law and add to it through its decisions. Thus, it can define a certain act as an international crime or indicate its criminal character in international law.<sup>73</sup>

Nevertheless, the cited view of Professor Woetzel ignores the fact that, so far as 'Nuremberg Law' was concerned, the resort to growth on lines analogous to those which have marked the evolution of the common law was manifested by the London Agreement and Charter and not, except by obiter pronouncements, in the Tribunal's judgment.

Another notable exception was Professor Glueck, who, in a discussion of 'Crimes against Peace' expressly used the words 'modern international common law':

Every recognition of custom as evidence of law must have a beginning some time; and there has never been a more justifiable stage in the history of international law than the present, to recognize that by the common consent of civilised nations as expressed in numerous solemn agreements and public pronouncements the instituting or waging of an aggressive war is an international crime.<sup>74</sup>

One of the most recent and authoritative judicial descriptions of the manner in which, and the purposes for which, the common law has evolved in English law is that of the House of Lords in Shaw v. Director of Public Prosecutions (1962) A.C. p. 220. The appellant was convicted at the Central Criminal Court on three counts which alleged the following offences: (1) conspiracy to corrupt public morals; (2) living on the earnings of prostitution; and (3) publishing an obscene publication. He appealed against conviction to the Court of Criminal Appeal on all three counts. His appeal was dismissed, but that court certified that points of law of general public importance were involved in the decision on the first and second counts and gave him leave to appeal on them to the House of Lords. It refused so to certify in respect of the third count. By a majority appeal.

Viscount Simonds said, at p. 267:

The fallacy in the argument that was addressed to us lay in the attempt to exclude from the scope of general words acts well calculated to corrupt public morals just because they had not been committed or had not been brought to the notice of the court before. It is not thus that the common law has developed

... In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for . ... But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society.

Lord Tucker adopted a similar approach to Count 1 of the indictment. He cited the following extract from the judgment of Parke J. in Mirehouse v. Rennell (1833 1 Cl. & F. 527, at p.546):

The case, therefore, is in some sense new, as many others are which continually occur; but we have no right to consider it, because it is new, as one for which the law has not provided at all; and because it has not yet been decided, to decide it for ourselves, according to our own judgment of what is just and expedient. Our common law system consists in the applying to new combinations of circumstances those rules of law which we derive from legal principles and judicial precedents ... It appears to me to be of great importance to keep this principle of decision steadily in view, not merely for the determination of the particular case, but for the interests of law as a science.

Lord Wright, as noted supra, vigorously argued that the London Agreement and Charter were declaratory of existing international law. In his Foreword to History of the United Nations War Crimes Commission (1948), he invoked what he termed 'the growth of the common law of war'. However, in the Introductory Chapter to that work, Lord Wright expressed the following views (p. 8):

International law is a product of natural law, that is, it has grown from the workings of the moral impulses and needs of mankind by a sort of instinctive growth, as well as by edicts or decrees or authoritative pronouncements. In this it resembles all customary law. Indeed it is in itself a body of customary law. Its dictates take shape and definition particularly when they are acted upon and are recognised by the common consensus of mankind and are administered and enforced by competent courts. ... But international law is not the law of any single nation. Any nation may act upon it and adopt it and in that sense it may be said to be the law of that nation, but it is still international law, which is the law of the community of nations.

A degree of ambivalence in the presentation by Lord Wright of his fundamental proposition appears in the following extract from the same Introductory Chapter (p. 19):

Even if I were wrong in my view that the positive law announcing the crime and defining the criminality was in existence at all times material, at least the criminality of wholesale murder and the like was apparent and all that was lacking was some precise enunciation of positive law and punishment; that defect could, in my opinion, be made good by subsequent declaration and clarification of the particular breach of law and the punishment. If it were necessary, I could go further and say that the definition of a clear and atrocious moral offence as being also an offence of positive law can be lawfully made by the competent court or legislature. This indeed is the normal method of developing international law which extends its boundaries on the principle of analogy just as the common law has done. (emphasis added).

The difficulty that the writer finds with Lord Wright's expositions is that they appear to involve two confusions: first, the assertion that all the counts for which the London Charter provided were valid under existing international law, but, in the alternative, recourse could be had to the development of international law on principles analogous to the evolution of the common law; second, if the true basis of 'Nuremberg Law' was its conformity with common law growth, either the competent court or a legislature could be the vehicle for defining certain crimes as crimes of positive law. The latter argument does not pay regard to the fact that the Charter defined all the four counts in the indictment, not the Tribunal, except to the extent to which it gave approval to such definition by obiter pronouncements. The author's respectful view is that the alternative bases advanced by Lord Wright contributed to the criticisms of 'Nuremberg Law'.

It seems that Lord Wright reverted to his original tenet when he wrote in the Foreword to volume 15 of the Law Reports of Trials of War Criminals (pp- viii-ix):

Al I want to emphasise at the moment is that the law of war is a definite body of jurisprudence, giving a 'standard certain', to quote the words of Scott and Lancing in the Minority Report annexed to the Report of the Commission on Responsibilities issued at the end of World War I.

One of the most incisive expositions of the argument that international law is capable of development in the mould of the common law was contained in the opening address of Mr. Justice Jackson at Nuremberg:

It is true of course, that we have no judicial precedent for the Charter. But international law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties and agreements between nations and of accepted customs. Yet every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for international law, we cannot deny that our own day has the right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened international law. International law is not capable of development by the normal processes of legislation ... international law grows, as did the common law, through decisions reached from time to time in adopting settled principles to new situations. The fact is that when the law evolves by the case method, as did the common law and as international law must do if it is to advance at all, it advances at the expense of those who wrongly guessed the law and learned too late their error.<sup>75</sup>

I consider the only criticism which can be made of the cited passage is that those who were tried and convicted at Nuremberg did not incorrectly 'guess the law' but simply ignored it, in both its existing and, by legislative prescription, potential forms.

Brigadier General Taylor echoed the approach of Mr. Justice Jackson:

International law ... must grow as did the common law in the days of its rude origins, before there were statutes, judicial opinions and legal definitions ... International jurisprudence must, therefore, by its very nature lie closer to the historical than the analytical school, and international law is generally customary rather than positive.<sup>76</sup>

A number of the Tribunals in the 'Subsequent Proceedings' at Nuremberg considered the analogy of the development of the common law in relation to 'Crimes against Peace'. However, since Article X of Military Government Ordinance No.7 (see Annexe 2 to Chapter 13) provided that determinations of the International Military Tribunal relating, *inter alia*, to aggressive wars should be binding on those Tribunals, their pronouncements lacked the juridical authority of the I.M.T. Nevertheless, some of the opinions expressed by the American Tribunals support the fundamental argument relating to the common law analogy. For example, in the *Ministries Case* (see Case No.11, Chapter 13), the Tribunal stated: 'We think it may be said the basic law ... [the London Charter, supplemented by Control Council Law No.10] simply declared, developed and implemented international common law.' (emphasis added). Again, in the same case, it was stated:

... international common law grows out of the common reactions and the composite thinking with respect to recurring situations by the various states composing the family of nations ...

While it is undoubtedly true that international common law in case of conflict with state law takes precedence over it and while it is equally true that absolute unanimity among all the states in the family of nations is not required to bring an international common law into being, it is scarcely a tenable proposition that international common law will run counter to the consensus within any considerable number of nations.<sup>77</sup>

In its exposition of the 'Law of the Charter', the International Military Tribunal did not develop the doctrine of international common law in the sense in which it has been discussed in this study. Whilst recognising the decisive and binding force of the Charter, it preferred to support the validity of the legislative instrument under which it was created essentially by invoking the Pact of Paris and the 'international history which preceded it'. The Tribunal, without referring to any analogy with the common law, merely stated:

The law of war is to be found not only in treaties, but in the customs and practices of states which

gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principles of law already existing.<sup>78</sup>

### Conclusion on the validity of 'Nuremberg Law'

An analysis of the literature, to some of which reference has been made in its section, indicates that there were, and that there remain, three principal divergent opinions in respect of the legal soundness of the London Agreement and Charter. The writer will argue that a fourth distinct view is the correct one, and that, although its expression can at times be discerned to a limited extent, it has not been advanced in the simple, uncomplicated manner which it merits. These opposed attitudes will now be examined.

First, there are those who assert that the Agreement and Charter were legally valid instruments because they were an application of existing international law, an argument which the writer rejects. The practical importance of that argument is that, if it were correct, it validates in itself the definition of 'Crimes against Peace' in paragraph 6(a) of the Charter, without the need for any further justification.

The etymology of the verb 'to exist' shows its early use as an auxiliary 'to be' and, in Middle English, as denoting 'reality'. Its more modern denotation is simply 'being; the fact or state of existing' (Shorter Oxford English Dictionary, vol. 1, p. 702).

A legal rule, for the purposes of international law, especially one which may attract penal consequences, can only 'exist' in one of two ways: (a) by a statement of the rule in a form which makes it clear that it is accepted as binding either universally or by the vast majority of the community of civilised nations (for example, in a treaty, convention or agreement); or (b) that it is otherwise part of customary international law by virtue of it being recognised or practised in the course of inter-relationships between consenting civilised countries.

It is submitted that the 'existence' of 'Crimes against Peace', as defined in the Charter, was not established in August 1945 because neither of the two stated criteria was applicable. The two strongest protagonists for the opinion that the Charter was the expression of international law 'existing' at the time of its creation were the Tribunal itself and Lord Wright. Neither was prepared to concede that there was a clear alternative and single basis on which the validity of the Agreement and Charter should be based, although Lord Wright, in the passage cited *supra* in this Chapter, gave qualified approval to what he termed 'the principle of analogy' after the practice of the common law. The Tribunal based its reasoning principally on the Pact of Paris, which is considered, as a separate matter, later in this Chapter.

Second, defence counsel at Nuremberg and a number of authors have claimed that the legal fallacy in 'Nuremberg Law' was that it was in conflict with two maxims or principles which are fundamental to a sound jurisprudence: the ex post facto principle and the maxim 'nullum crimen nulla poena sine lege'. The writer views these two concepts as cognate and will later treat them together.

The short answer to the arguments based on them is that, if it is accepted that the London Agreement and Charter were intrinsically legally valid in the circumstances which existed in Germany between 8 May and 8 August 1945, as we argue was the position, then neither concept was relevant or capable in a legal sense of affecting the untrammelled sovereign legislative authority of the Allied Powers.

The writer's argument may be appreciated more clearly if it were assumed that the Nuremberg trial had taken place before a jury, in the manner recognised by Anglo-American criminal jurisprudence. In such a case, the Tribunal would have been bound to direct the jury that if it was satisfied beyond reasonable doubt that all the elements of a particular count had been established, then, applying the law as directed by the Tribunal, the jury should convict an accused. Further, in view of the fact that the Tribunal was of the opinion that the provisions of the Charter were binding and decisive, like the terms of a national criminal code, it would have been obliged to direct the jury that it should ignore extraneous arguments or issues. On that analogy, the two cognate concepts were extraneous and irrelevant and should not have entered into the Tribunal's consideration. In stating in its judgment that 'in view of the great importance of the questions of law involved, the Tribunal has heard full argument from the Prosecution and the Defence, and will express its view on the matter'<sup>79</sup>, the Tribunal not only went beyond its jurisdiction but also misdirected itself. When a court, sitting without a jury, hears a



criminal charge, it is bound to direct itself, on both the facts and the law, in accordance with appropriate legal principles, and the absence of a jury does not in any way relieve it of this obligation (cf. the Irish courts established for the trial of persons involved in terrorist activities, which are comprised of judges who sit without a jury, as in the case of those charged with the murder of Lord Mountbatten).

A third viewpoint, to which reference has been made *supra* in this Chapter, is that of Dr. Lüders, who argued that it was immaterial whether or not the London Agreement and Charter prescribed new international law, as distinct from clarifying existing international law. The difficulty in accepting that argument is that it does not explain what Dr. Lüders meant by 'clarification'; nor does it import, either expressly or by implication, the notion of analogy with the development of the common law. Further, in the cited passage Dr. Lüders did not draw any distinction between the Charter and the Judgment of the Tribunal.

The view advanced in this study is that the London Agreement and Charter, executed by representatives of the governments of the four Allied Powers which were in occupation of the whole of Germany, constituted a valid enactment within their legislative authority as joint sovereigns of the territory of the Third Reich. As was stated in the fourth preambular paragraph, the Agreement was concluded by the four governments 'acting in the interests of all the United Nations and by their representatives duly authorised thereto'. (emphasis added). The Agreement did not specify which countries comprised the 'United Nations', but there can be no doubt that they included the four signatories and at least nineteen other countries, the governments of which expressed their adherence to the Agreement (Article 5). Certainly there has not been any challenge to the factual position that the vast majority of the civilised countries of the world were party to, or privy to, the Agreement.

There is impressive support in the literature for the proposition that international law is a living jurisprudential entity designed to enhance the peaceful and orderly relationships between nations, just as municipal laws exist to regulate, in the public interest, the societies of individual countries. International law has developed slowly, partly because there is no international legislature and, in criminal matters, no international judicial body to enforce it. Nevertheless it is idle to deny the jurisprudential capacity of international law to expand its proscriptions in order to deal justly and fairly with new situations, whether or not they could or should have been foreseen. It is that capacity which is the rationale of the common law. Without it, especially in modern world society, the body of law which scholars such as Grotius espoused would be sterile and destined to decay. Fortunately, that possibility was foreclosed by the London Agreement and Charter, followed by the judgment of the Tribunal and the unanimous affirmation by the General Assembly of the United Nations Organisation on 11 December 1946 of 'the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal'. In a report delivered before the General Assembly on 24 October 1946, the Secretary-General stated:

In the interest of peace, and in order to protect mankind against future wars, it will be of decisive significance to have the principles which were implied in the Nuremberg trials, and according to which the German war criminals were sentenced, made a permanent part of the body of international law as quickly as possible.

From now on the instigators of new wars must know that there exist both law and punishment for their crimes. Here we have a high inspiration to go forward and begin the task of working toward a revitalised system of international law.<sup>80</sup>

It is a matter of regret that many critical writers on 'Nuremberg Law' have perceived the trial in terms of theory and, at times, philosophy. The answer to their arguments is in the words of Brigadier General Taylor: 'International jurisprudence must, ... by its very nature, lie closer to the historical than the analytical school, and international law is generally customary rather than positive. This viewpoint is in tune both with that of the libertarian, utilitarian and often free-thinking Founding Fathers and that of Roman Catholic theological jurisprudence. The theory and practice of the international law of war abundantly manifest its customary basis.'<sup>81</sup>

The same theme was expressed by Professor Glueck:

So is it with modern international common law, in prohibiting aggressive war on pain of punishment. Every recognition of custom as evidence of law must have a beginning some time; and there has never been a more justifiable stage in the history of international law than the present, to recognize that my the common consent of civilized nations as expressed in numerous solemn agreements and public pronouncements the instituting or waging of an aggressive war is an international crime.<sup>82</sup>

From the turn of the nineteenth century until 1939 there were considerable advances in the written expression of binding rules relating to warfare. The Hague Conventions of 1899 and 1907 initiated those advances, which were extended by the Geneva Conventions of 1929. Germany ratified (with reservations) the 1907 Convention and the 1929 Conventions. Professor Glueck has stated:

The Hague and Geneva Conventions, to be sure, took for granted the legality of war; but, from motives both of humanitarianism and mutual prudence, they went so far in the direction of limiting the methods of opening hostilities (Hague Convention (III), 1907) and conducting war, as to be signposts on the road toward a growing conviction that aggressive war must somehow be abolished.<sup>83</sup>

Article 227 of the Treaty of Versailles provided for the public arraignment of Kaiser Wilhelm II 'for a supreme offence against international morality and the sanctity of treaties' before a special tribunal composed of five judges, one appointed by each of the Allied and Associated Powers (the United States of America, Great Britain, France, Italy and Japan). Although the Article did not refer expressly to 'crimes against peace' or 'aggressive war', it certainly contained the germ of the proscription of aggressive war and asserted the justiciability of charges against those accused of such offences before an inter-Allied tribunal.

The Nuremberg Tribunal recognised the international history which preceded the Pact of Paris.<sup>84</sup> It is significant that the draft of a treaty of mutual assistance prepared under the auspices of the League of Nations in 1923 provided that 'aggressive war is an international crime' and that the parties would 'undertake that no one of them will be guilty of its commission'. Germany was, of course, not a member of the League of Nations. The draft was submitted to twenty-nine States, about half of which approved the text. In the case of the other nations, their reluctance stemmed principally from their views concerning the difficulties in agreeing upon a definition of what constituted 'aggressive war', just as the United Nations Organisation was unable to agree upon an appropriate definition until 1974. The failure to achieve the adoption of the draft should not therefore be seen as a negation of the principle that aggressive war was an international crime, but rather as a manifestation of the problems which it was perceived could arise in its practical application. Moreover, the United States of America could not adhere to the draft because it was not a member of the League.

The discussion in its judgement by the Nuremberg Tribunal of the significance of what is commonly known as the 1924 Geneva Protocol is convincing:

The preamble to the League of Nations Protocol for the Pacific Settlement of International Disputes ..., after 'recognising the solidarity of the members of the international community' declared that 'a war of aggression constitutes a violation of this solidarity and is an international crime'. It went on to declare that the contracting parties were 'desirous of facilitating the complete application of the system provided in the Covenant of the League of Nations for pacific settlement of disputes between the states and of ensuring the repression of international crimes'. The Protocol was recommended to the members of the League of Nations by a unanimous resolution in the Assembly of the forty eight members of the League. These members included Italy and Japan, but Germany was not then a member of the League.

....

Although the Protocol was never ratified, it was signed by the leading statesmen of the world, representing the vast majority of the civilised states and peoples, and may be regarded as strong evidence of the intention to brand aggressive war as all international crime.<sup>85</sup>

The next significant development was the unanimous adoption of a declaration relating to aggressive war by the Assembly of the League of Nations on 24 September 1927, including representatives of Germany, Italy and Japan. The preamble stated:

The Assembly; Recognising the solidarity which unites the community of nations; Being inspired by a firm desire for the maintenance of general peace; Being convinced that a war of aggression can never serve as a means of settling international disputes, and is in consequence an international crime ...

As Glueck has said, the preamble to the Declaration shows 'how strong was the conviction that the time had arrived, in the affairs of states and their peoples, to call a spade a spade'.<sup>86</sup>

Shortly before the signing of the Pact of Paris, twenty one American Republics, meeting at the Sixth (Havana)

Pan-American Conference, unanimous]y resolved on 18 February 1928 that 'war of aggression constitutes an international crime against the human species'. It could not be doubted that the intention of the resolution was to designate aggressive war as criminal within the jurisprudence of international law.

There followed the signing on 27 August 1928 of the Pact of Paris which, because it involves questions of legal construction and was relied upon so strongly by the prosecution and, in turn, by the Nuremberg Tribunal, will be considered separately later in this Chapter.

There does not appear in the literature any significant denial of the lawful authority of the Allied Powers to put into effect legislative provisions for the general government of the territory over which they exercised undisputed sovereignty. To the extent to which that sovereign authority is disputed, attention should be drawn to the 'denazification' policies which the Allies pursued for several years through the authorities, the Spruchkammer and the Spruchgericht. the policies were stated in legislation. The basic purpose was 'liberation from national socialism and militarism'. Ruckerl has thus described the administrative procedure:

This legislation stipulated that the political and social record of every adult German citizen should be examined in order to establish whether, and, if so, to what extent he had engaged in Nazi activities. to begin with, the operation was carried out with the help of a lengthy questionnaire (comprising no fewer than 131 questions in the American Zone of Occupation, for example). The idea was that it would enable a preliminary decision to be taken on the extent of individual guilt. If certain preconditions--named in the law--were fulfilled, the denazification courts and tribunals classified 'those concerned' into one of the following categories: exonerated, follower only, lesser offender, offender and major offender. Apart from the group of exonerated persons, classification in one of the above-named groups incurred appropriate penalties. These ranged from the imposition of a fine to a committal order for confinement in a labour camp for a maximum period of ten years. The fact that a person had belonged to a Nazi organisation in some function or other provided sufficient prima facie evidence to incriminate him. The onus of proving that appearances were deceptive rested on his shoulders.<sup>87</sup>

The comprehensive character of the denazification policies is illustrated by the fact that when the courts and tribunals ceased activities in the first half of the 1950s, they had imposed penalties of fines or imprisonment for several years on more than one and a half million persons in the three Western Zones of Occupation.<sup>88</sup>

It is difficult to distinguish logically, except as a matter of degree, between the London Charter and the denazification laws because in each case the legislation was essentially punitive and without any 'existing' positive precedent.

The author's thesis involves the proposition that there was no rule of international law which prevented the enactment of legislation which expressed in written form the criminal character of the planning, initiation and waging of a war of aggression. The criminality of such conduct had been attested by the actions, utterances and declarations on the part of the very large majority of civilised countries over a period of some decades. All that was needed was a formal prescription of what was a consensual affirmation by the Community of Nations, combined with the establishment of an appropriate judicial organ to exercise jurisdiction. As has already been stated, the only restrictions on the content of the legislation were those which civilised countries recognised as necessary to ensure a just and fair trial for those accused. It is submitted that the London Agreement and Charter recognised those restrictions. Finally it cannot be overlooked that twenty three nations were signatories or adherents to the London Charter, that the Tribunal, albeit *obiter*, confirmed its legality and that the United Nations Organisation unanimously affirmed the 'principles of international law recognised by the Charter.'

The Charter was the outgrowth of international common law, in no way different in principle or purpose from the evolution of the common law of Anglo-Saxon jurisdictions. What had been nascent prior to 8 August 1945 attained fulfilment on that day.

## THE CHARACTER AND COMPOSITION OF THE NUREMBERG TRIBUNAL

There has been some limited criticism, essentially technical or semantic, concerning the nature and composition of the International Military Tribunal. It is submitted that the general nature of the Tribunal was correctly described by Mr. Justice Jackson in his closing address:

In interpreting the Charter ... we should not overlook the unique and emergent character of this body as an International Military Tribunal. It is no part of the constitutional mechanism of internal justice of any of the signatory nations. Germany has unconditionally surrendered, but no peace treaty has been signed or agreed upon. The Allies are still technically in a state of war with Germany, although the enemy's political and military institutions have collapsed. As a military tribunal, this tribunal is a continuation of the war effort of the Allied nations. As an International Tribunal, it is not bound by the procedural and substantive refinements of our respective judicial or constitutional systems, nor will its rulings introduce precedents into any country's internal system of civil justice. As an International Military Tribunal, it rises above the provincial and transient and seeks guidance not only from international law but also from the basic principles of jurisprudence which are assumptions of civilization and which long have found embodiment in the codes of all nations.<sup>89</sup>

Although it has been suggested that the expression 'inter-Allied' would have been a more appropriate description of the Tribunal, there is no basis for criticising the use of the adjective 'international', which simply means 'existing, constituted, or carried on between different nations'.<sup>90</sup> Although an orthodox international tribunal is established as a result of the agreement of the parties involved, the *debellatio* of Germany made it impossible for the Tribunal to be *international* so far as the former Reich was concerned. There is no evidence that the Allied Powers ever contemplated a tribunal which was 'international' in a universal sense. They had in mind a restricted juridical body, similar to that for which the Treaty of Versailles following the First World War made provision. Moreover, as asserted in the Moscow Declaration of 30 October 1943, the policy of the Allied Powers was that major war criminals, whose crimes had no particular geographical location, would be punished pursuant to the joint decision of the Governments of the Allies. There was no rule of international law which prevented the four Allies from combining to take joint action in the same way as any one of them could have acted individually. The Nuremberg Tribunal acknowledged in its judgment the validity of such joint action.<sup>91</sup> Further, the Allied Powers delegated to the Control Council for Germany the power at any time to reduce or otherwise alter the sentences (Article 29 of the Charter). Schwarzenberger summarised his views as follows:

... the international character of the Nuremberg and Tokyo Tribunals was formal rather than substantive. They were international because they rested on a consensual international basis. Yet, in substance, they were joint tribunals of the Powers that created these *ad hoc* institutions.<sup>92</sup>

There can be no doubt that the Tribunal was 'military' in its essential character. The authority for its establishment was the product of the unconditional surrender of Germany and its *debellatio*, each of which facts was fundamentally 'military'. As experts in military law have asserted,<sup>93</sup> there was no rule or practice which prevented non-military persons being appointed members of the Tribunal. It seems that the senior Russian judge Nikitchenko was specially qualified: his title was 'Major-General Jurisprudence'. One advantage of designating the Tribunal as a military organ, bound by the prescriptions in the Charter and the rules of evidence and procedure for which it made provision, was that particular municipal law and practice were not relevant to its deliberations, except, when necessary, for the purposes of comparative analogy. Further, as the Tribunal stated in its judgment, 'It is not to be doubted that any nation has the right to set up special courts to administer law'.<sup>94</sup>

The trial at Nuremberg was before a 'Tribunal'. It was not designated a 'court'. As a Tribunal, it bore two features: it was *ad hoc* and judicial in a broad sense. Schwarzenberger wrote:

To assess the judicial standards attained at Nuremberg and Tokyo, it would be unfair to compare the Nuremberg and Tokyo proceedings with those of peacetime courts in the most advanced national communities. It is more appropriate to judge them against the background of the minimum standards expected to be observed by civilised belligerents under the laws of war.

...

Judged by these standards, the Charters of the Nuremberg and Tokyo Tribunals were considerably more protective of the interests of the accused than the minimum requirements of international law required.<sup>95</sup>

Some writers, very few of them lawyers, have referred in a derogatory manner to the Nuremberg trial as a manifestation of 'victors' justice',<sup>96</sup> and it has been suggested that the Tribunal should have been constituted

with some 'neutral' judges. This criticism ignores the fact that because the areas in which Germany waged its aggressive wars were vast and widespread it would have been difficult to select a responsible and civilised country which could have provided a judge with appropriate qualifications. Moreover, if one or more German judges had been included, the major Allied Powers would, no doubt, have feared a repetition of the farcical example of bias demonstrated during the Leipzig trials following the First World War. In the author's view, the trial at Tokyo was depreciated by the fact that the Tribunal comprised eleven judges from different countries, some of whom lacked the judicial stature of those who sat at Nuremberg. The claim of 'victors' justice' is without substance.

## THE LEGAL EFFECT OF THE PACT OF PARIS

The Kellogg-Briand Pact ('the Pact of Paris'), signed on 27 August 1928 by a large number of nations, including Germany, Italy and Japan, and later by other countries, was binding on sixty three States at the outbreak of war in 1939. At the Nuremberg trial, the Pact dominated the consideration of Count 2 of the indictment. It is proposed in this section to discuss the proper legal construction of the Pact and assess the extent to which the judgment of the Tribunal was in accordance with accepted legal principles of interpretation.

Count 2 of the indictment charged all the defendants with participation in the planning, preparation, initiation and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances, pursuant to paragraph 6(a) of the Charter. Particulars of the charge were contained in Appendix C to the indictment. Paragraph XIII of the Appendix alleged that:

Germany did, in violation of the Pact of Paris, on or about the date specified in Column 1, with a military force, attack the sovereigns specified in Column 2, respectively, and resort to war against such sovereigns, in violation of its solemn declaration, condemning recourse to war for the solution of international controversies, its solemn renunciation of war as an instrument of national policy in its relations with such sovereigns, and its solemn covenant that settlement or solution of all disputes or conflicts of whatever nature or origin arising between it and such sovereigns should never be sought except by pacific means.

The sovereigns of ten countries were specified.

Of the twenty six allegations of violations of treaties, agreements and assurances caused by the defendants in the course of planning, preparing and initiating the wars, the Tribunal in its judgment placed most emphasis on the Pact of Paris. Its conclusion amounted to the proposition that breach of the Pact of Paris in itself established, in appropriate cases depending on the facts, the guilt of twelve of the defendants under Count 2. It is this conclusion which the author disputes.

In its judgment the Tribunal cited from the preamble of the Pact:

Deeply sensible of their solemn duty to promote the welfare of mankind; persuaded that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples should be perpetuated ... all changes in their relations with one another should be sought only by pacific means ... thus uniting civilised nations of the world in a common renunciation of war as an instrument of their national policy.

The first two Articles of the Pact were then set out:

Article 1: The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations to one another.

Article 11: The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall

never be sought except by pacific means.

The most significant pronouncements of the Tribunal were:

In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing. War for the solution of international controversies undertaken as an instrument of national policy certainly includes a war of aggression, and such a war is therefore outlawed by the Pact.

...

In interpreting the words of the Pact, it must be remembered that international law is not the product of an international legislature, and that such international agreements as the Pact of Paris have to deal with general principles of law and not with administrative matters of procedure. The law of war is to be found not only in treaties but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practised by military courts. This law is not static, but by continual adaptation follows the needs of a changing world. In many cases treaties do no more than express and define for more accurate reference the principles of law already existing.<sup>97</sup>

Finally, after a survey of what it termed 'the international history which preceded the Pact', the Tribunal stated:

All these expressions of opinion, and others that could be cited, so solemnly made, reinforce the construction which the Tribunal placed upon the Pact of Paris, that resort to a war of aggression is not merely illegal, but is criminal.<sup>98</sup>

The judgment of the Tribunal was in accord with the very strong submissions of Sir Hartley Shawcross, Chief Prosecutor for the United Kingdom, in his opening address. He argued that by the time Germany had accomplished its design of aggressive war against the civilised world, 'aggressive war had become, in virtue of the Pact of Paris and the other treaties and declarations ... illegal and a crime beyond all uncertainty and doubt. And it is on that proposition, and fundamentally on that universal treaty, the Kellogg-Briand Pact, that Count Two of this indictment is principally based.'<sup>99</sup>

The address of Sir Hartley Shawcross was lengthy and impassioned. It was not until near its end that he used the words 'crime' or 'criminal' in relation to the Pact. He emphasised the express provision in the preamble that no State guilty of a violation of its terms might invoke its benefits, but thereby, it is submitted, exposed the weakness of the interpretation for which he argued. The address did not contain any compelling legal argument based on the actual construction of the document, but rather invective, of which the following is an example:

Will it seriously be said by these defendants that such a war is only an offence, only an illegality, only a matter of condemnation perhaps sounding in damages, but not a crime justiciable by any Tribunal. No law worthy of the name can allow itself to be reduced to an absurdity in that way, and certainly the great powers responsible for this Charter were not prepared to admit it.<sup>100</sup>

There was a mixed reception of the pronouncements of the Tribunal and the reasoning expressed in its judgment in relation to the Pact of Paris. A small proportion of writers gave the judgment full support; <sup>101</sup> some accepted it with qualifications;<sup>102</sup> others were ambivalent; <sup>103</sup> and a large proportion rejected it.<sup>104</sup> Selected examples are cited in footnotes 101-104, merely as being representative of the principal categories of the divergent views.

The legal effect of the Pact of Paris has been one of the most controversial issues in any assessment of the validity of 'Nuremberg Law'. The author's views do not fit exactly into any of the four categories to which reference has been made above, probably because the approach we have adopted is purely that of a trial lawyer

rather than that of writers who have used an academic or theoretical basis for the expression of their views.

The legal effect of the Pact of Paris has been one of the most controversial issues in any assessment of the validity of 'Nuremberg Law'. The author's views do not fit exactly into any of the four categories to which reference has been made above, probably because the approach we have adopted is purely that of a trial lawyer rather than that of writers who have used an academic or theoretical basis for the expression of their views.

It is first necessary to draw a clear distinction between the pronouncements of the Tribunal and the reasoning which led to the framing of paragraph 6(a) of the Charter. The extracts from the judgment of the Tribunal cited *supra* were part of an exegesis which the Tribunal acknowledged was not 'strictly necessary' in view of the terms of the Charter. As such, its conclusions as to whether, and to what extent, aggressive war was a crime before the London Agreement were *obiter dicta*. By contrast, as we have argued, the provisions of the Charter were a legitimate expression of international common law.

The task which the Tribunal assumed was to determine the legal effect of the Pact by the application of accepted principles of statutory construction. The over-riding obligation was to ascertain the intentions of the signatories as deduced from the plain and natural meaning of the words used, to construe the instrument as a whole, to consider the *travaux préparatoires* and to take into account the surrounding circumstances as an indication of the 'mischief' which the Pact was designed to remedy.

It is a convenient starting point in reaching a correct interpretative judgment to consider a number of features of the Pact which were of a negative character, bearing in mind that the Tribunal concluded that the Pact established that aggressive war was a justiciable crime on the basis of *lex lata*.

First, the Pact did not embrace aggressive war in any universal sense. There were at least six categories of war which were excluded from its operation, either expressly or by necessary implication.

Second, the only express sanction for violation of the Pact was contained in the preamble, which provided that 'any signatory power which shall hereafter seek to promote its national interests by resort to war should be denied the benefits furnished by this treaty'. Even that sanction had virtually no coercive force because an aggressor nation could hardly have expected that once it had embarked on an aggressive war, at least some other nations which were parties to the Pact would have refrained from retaliatory hostilities. In fact, this was the position by virtue of the declaration by Great Britain of war on Germany on 3 September 1939. But the strongest argument, in the context of the construction of the instrument, is that if the signatories had intended to enter into a treaty whereby the planning and waging of aggressive war was declared to be an international crime, it would have been a simple drafting matter to have ensured that the Pact made express provision accordingly. That is the clear principle applicable in the construction of municipal penal statutes. In the author's view it is decisive.

Third, the phraseology of the Pact was not that which would normally be used in an instrument intended to proscribe conduct as criminal, and make such conduct justiciable before a non-existing tribunal or court, with power to sentence persons to death. On analysis, the language used in the preamble reveals four pious assertions, which were essentially moralistic and humanitarian in character. There followed three Articles, the third of which was merely administrative. The first two Articles were declaratory expressions of the intention of the parties to *condemn* recourse to 'war' (of which there was no definition) and to *seek* the resolution of disputes only by pacific means. Nevertheless, in three sentences the Tribunal concluded that the renunciation of war as an instrument of national policy 'necessarily involved' that such a war is criminal.<sup>106</sup> It is submitted that the conclusion is not supported by any convincing reasoning.

Fourth, since the intention of the signatories was the essential question, it is noteworthy that the Pact did not contain any provisions for its enforcement as an international treaty prescribing a crime for which individuals could be punished. The Covenant of the League of Nations lacked any enforcement mechanism. The defect should not, in the writer's view, simply be dismissed as a matter of procedure, capable of being established in some manner in the event of violation of the Pact.

The Tribunal was faced with the argument that 'the Pact does not expressly enact that [aggressive] wars are crimes or set up courts to try those who make such wars'. It attempted to meet that argument by its statement that 'to that extent the same is true with regard to the laws of war contained in the Hague Convention. The Hague Convention of 1907 prohibited resort to certain methods of waging war'. The Tribunal acknowledged that 'for many years past ... military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention. But this reasoning does not impress as being, convincing, because it does

not address the fundamental question of the intention of the parties.

The tribunal purported to support its conclusion by citing a statement made by Mr. Stimson, Secretary of State of the United States, in 1932 that 'war between nations was renounced by the signatories of the Kellogg-Briand Treaty. This means that it has become throughout the entire world ... an illegal thing. Hereafter, when nations engage in armed conflict, either one or both of them must be termed violators of this general treaty law ... we denounce them as lawbreakers'.<sup>107</sup>

As Viscount Maugham observed, that statement does not support the Tribunal's judgment because it clearly referred only to the nations which violated the Pact and not to individuals. More importantly, the Tribunal omitted any reference to the following statement by Mr. Stimson in the same speech:

The Kellogg-Briand Pact provides for no sanctions of force. It does not require any signatory to intervene with measures of force in case the Pact is violated. Instead it rests upon the sanction of public opinion, which can be made one of the most potent sanctions of the world. Any other course, through the possibility of entangling the signatories in international politics, would have confused the broad, simple aim of the treaty and prevented the development of that public opinion upon which it most surely relies. Public opinion is the sanction which lies behind all international intercourse in time of peace. Its efficacy depends upon the will of the people of the world to make it effective. If they desire to make it effective, it will be irresistible.<sup>108</sup>

Viscount Maugham cited from a book, published in 1948, of which Mr. Stimson was a joint author,<sup>109</sup> in which it was stated:

The Treaty contained no provision for enforcement, and one of its authors, Frank B. Kellogg, had specially stated that no enforcement was incumbent on the signatories. It was a pact of self-denial, and its weaknesses were soon to become apparent, but in the spring of 1929 it was young and undamaged and it fairly represented both the profoundly peaceful attitude of the Americans and their gross ignorance of what must be done to keep the peace unbroken.

The author argues that it was unnecessary for the Tribunal to attempt to derive from the Pact of Paris the legal consequences which it attributed to the Pact. The treaty certainly was capable of taking its place in the historical evolution of the principle that aggressive war was a crime under international law for which individuals could bear personal liability. But it was not incumbent on the Tribunal to go beyond that point. It appears that the Tribunal was not prepared to recognise in positive and unambiguous terms, consonant with the provisions of the Charter, that international law had the capacity in 1945 to assert its intrinsic common law jurisprudence. The Tribunal did, however, state that 'this law is not static, but by continual adaptation follows the needs of a changing world'.<sup>110</sup> However, such adaptation had its place in the provisions of the Charter; the Pact of Paris was only one element in the evolutionary process.

Professor Bassiouni's view was graphically expressed:

To posit that 'Aggression' is an international crime in the absence of a specific conventional penal proscription requires stitching together the many international instruments, of varied legal significance and enforceability, over a period of 85 years along with the sporadic occasions evidencing the practices of states in prosecuting and punishing the perpetrators of such an offence or attempting to do so. Thus, it is the sum total of a historical baggage of doctrine, conventions, and other instruments and practices, which cumulatively evidences the world community's position that 'Aggression' is an international crime.<sup>111</sup>

### 'NULLUM CRIMEN SINE LEGE' and 'EX POST FACTO'

Two jurisprudential principles, which are cognate and therefore will be discussed together, dominated the trial at Nuremberg: nullum crimen sine lege and ex post facto legislation. Once it is accepted that the London Charter was a valid exercise of legislative authority by the Allied Powers, the significance of the principles is not



relevant, and, in any event, is now academic. Nevertheless, it is necessary to consider to what extent, if any, the principles affected the prescription of the law of the Charter.

The Tribunal dealt briefly with the principles in its judgment:

It was urged on behalf of the defendants that a fundamental principle of all law -- international and domestic -- is that there can be no punishment of crime without a pre-existing law. 'Nullum crimen sine lege, nulla poena sine lege.' It was submitted that ex post facto punishment is abhorrent to the law of all civilised nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

In the first place, it is to be observed that the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.<sup>112</sup>

In Anglo-Saxon systems of law, the ex post facto principle finds expression in two ways. First, legislatures are extremely reluctant to enact laws which infringe the principle, but, at least in Australia, are prepared to do so in exceptional cases if convinced that it is fundamentally just and is necessary in the public interest. Second, in construing statutes, courts respect the principle unless the contrary intention of Parliament is manifestly apparent. The Tribunal was plainly correct in its view that the maxim was a 'principle of justice', rather than an entrenched and binding rule from which there should be no departure.<sup>113</sup>

German defence counsel were orthodox in their assertions of the applicability of the principle, but they did not advance any compelling reasons. They simply extracted the principle from municipal jurisprudence (other than that of Germany; see infra) and argued that it applied to the Nuremberg indictment, regardless of the facts. It was unconvincing advocacy.<sup>114</sup>

In the writer's view, Professor Brownlie adopted a common-sense position when he wrote:

The question whether the provisions in the Nuremberg Charter for punishment of crimes against peace infringed the principle nulla poena sine lege is now academic, except in so far as it is possible to argue that the value of the trial as a precedent would be impaired by any retroactivity. Post-war controversy produced these standpoints inter alia: (1) the law; (2) that it was a principle of justice and was not infringed provided the illegality of aggressive war was known to the accused; (3) the retroactivity was procedural and not substantive; (4) there was no retroactivity ... The view of the present writer is that the principle is one of justice and not one of positive law even in the sphere of municipal law, since in a municipal law system it is only an effective limitation of power if presented as a constitutional guarantee ... As a principle of justice it was not disregarded at Nuremberg as the illegality of aggressive war was established in the law by 1939 and as the particular acts punished were so obviously illegal it could not be objected that the precise content of aggressive war was not yet determined by the law. Those punished for crimes against peace were ignorant neither of the legal nor the moral prohibition of aggressive war.<sup>115</sup>

Professor N.C.H. Dunbar has drawn attention to the ironical situation that those who most strongly argued the relevance of the maxim of ex post facto legislation at Nuremberg were forced to ignore their own municipal law as it existed in 1939 and even afterwards, because the principle of nullum crimen sine lege was discarded by Article 2 of the 'Law to Change the Penal Code' promulgated by the Reich Minister of Justice on 28 June 1935. That Article provided:

Whoever commits an act which the law declares as punishable or which deserves punishment according

to the fundamental idea of penal law and the sound concept of the people, shall be punished. If no specific law can be directly applied to this act, then it shall be punished according to the law whose underlying principle can most readily be applied to the act.<sup>116</sup>

Moreover, as Professor Dunbar observed:

Nor was Germany the only country boasting a highly developed legal system to reject the *ex post facto* doctrine. Thus, Article 2 of the Russian Penal Code of 1926 rendered criminally liable 'all citizens of the R.S.F.S.R. who have committed socially dangerous acts ...'. And Article 13 of the Italian penal project of 1921 followed this line by declaring criminal 'acts which are committed solely for political motives or in a collective interest.'<sup>117</sup>

A significant majority of authoritative writers on international law have accepted the judgment of the Nuremberg Tribunal, although not always for the same reasons and at times with a degree of dubiety.<sup>118</sup>

It would have been an exercise in quixotism if the Tribunal had disregarded the provisions of the London Charter as distinct from judicially interpreting them. Those who framed the Charter deliberately excluded any scope for the *ex post facto* principle. At the London Conference in July 1945, Sir David Maxwell-Fyfe, chairman of the Conference, said:

There is one fundamental point that I want to see whether we are agreed on. I think we are. I want to make clear in this document what are the things for which the Tribunal can punish the defendants. I don't want it to be left to the Tribunal to interpret what are the principles of international law that it should apply. I should like to know whether there is general agreement on that, clearly stated -- for what things the Tribunal can punish the defendants. It should not be left to the Tribunal to say what is or is not a violation of international law.<sup>119</sup>

Thus the exclusion of the *ex post facto* maxim was embodied in the Charter. It is submitted that this was proper in the circumstances. There was no rule of international law in 1945 which made the application of the maxim obligatory. <sup>120</sup> Those convicted at Nuremberg, whether as principals or accomplices, had set themselves above any law long before the outbreak of the Second World War. As Hitler said:

I shall shrink from nothing. No so-called international law, no agreements will prevent me from making use of any advantage that offers. The next war will be unbelievably bloody and grim.<sup>121</sup>

That prediction was accurate. It is ludicrous to argue that those convicted at Nuremberg were unaware of what they had done or of the premeditated character of the acts of barbarity pleaded in the indictment, the truth of which was hardly disputed. Their *mens rea* was patent. They were not in the position of persons whom the maxim *nulla poena sine lege* was designed to protect: that is, they were not individuals who believed their actions were legally proper and, when the war ended, discovered that international law proscribed those actions.<sup>122</sup> It is trite, but true, to repeat that 'murder is murder'. Critics of 'Nuremberg Law' on the basis of *ex post facto* legislation should examine the transcript in the 'Einsatzgruppen Case' in the 'Subsequent Proceedings' and consider whether any principle of justice could in conscience be invoked to allow acts of such barbarity to pass unpunished.

## THE ACTS OF STATE DOCTRINE: INDIVIDUALS AS THE SUBJECT OF INTERNATIONAL LAW

The scope of the acts of state doctrine in international law was, before the London Agreement and Charter of 8 August 1945, subject to considerable controversy among writers. Conceptually, the doctrine was that an individual is not responsible for acts done as an agent of his state because accountability devolves upon 'the collectivity of individuals' -- that is, the State.<sup>123</sup>

Although the doctrine, in its classical form, had affinity with the principle of *respondeat superior*, it found expression in diverse circumstances. Many writers, including Professor Kelsen, viewed the doctrine as 'a necessary limitation of the right of states to take proceedings against foreign nations'.<sup>124</sup> A feature of the doctrine was that it was not regarded as of universal application, but was subject to exceptions, even though the exceptions were at times controversial. Thus Kelsen recognised that:

A clear exception is established by the rules regarding espionage and war treason. General international law authorises the State against which acts of espionage or war treason have been committed to punish the perpetrators as criminals, even if the acts concerned have been committed at the command or with the authorization of the enemy government. In contradistinction to other war crimes, the State in whose interest espionage or war treason is committed is not obliged to prevent or to punish acts of this nature. The State which employs spies or makes use of war treason in its own interest does not violate international law and is not responsible for these acts.<sup>125</sup>

Other writers extended that exception to war crimes on the basis that the doctrine did not apply to acts in time of war.<sup>126</sup>

The most significant area of conflict of views concerning the doctrine was whether or not the relevant acts were violations of international law. Several prominent writers expressed conflicting opinions on this question.<sup>127</sup>

However, in the writer's view, individual responsibility for the criminal acts pleaded in the indictment could not be contested at Nuremberg, quite apart from the provisions of Articles 6 and 7 of the London Charter. An important practical consideration was that of the twelve accused who were sentenced to death, eleven were convicted of both war crimes (Count 3) and crimes against humanity (Count 4); the other defendant (Streicher), who was not charged under Count 3, was found guilty under Count 4. In the individual reasons for judgment relating to Streicher, the Tribunal stated:

Streicher's incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution on political and racial grounds in connection with war crimes, as defined by the Charter, and constitutes a crime against humanity.<sup>128</sup>

One of the most assertive pronouncements of the Tribunal was the part of its judgment concerning individual responsibility which, in the view of the writer, was legally sound and mandatory from the viewpoints of justice and morality. The Tribunal stated:

It was submitted that international law is concerned with the action of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposed duties and liabilities upon individuals as well as upon States has long been recognised ... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.<sup>129</sup>

The Tribunal expressed the opinion that the provisions of Article 228 of the Treaty of Versailles 'illustrate and enforce this view of international responsibility'. The catchcry at the end of the First World War of 'Hang the Kaiser' was certainly an expression of world sentiment that an individual could be, and in appropriate circumstances should be, held criminally accountable for conduct which violated all concepts of humanity. Yet the Kaiser's conduct fell far short of the inhumanity practised so sadistically by the Nazis.

After citing Article 7 of the Charter, the Tribunal added:

... the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorising action moves outside

its competence under international law.<sup>130</sup>

In essence, the judgment of the Tribunal applied the fundamental rule of criminal jurisprudence that mens rea, or consciousness of guilt, is an essential ingredient of individual criminal responsibility. The rule was given scant consideration in the arguments of defence counsel at Nuremberg. The facts pleaded in the indictment and established by evidence, often by means of captured German documents, were virtually uncontested. It is beyond argument that none of those convicted at Nuremberg could have been unaware of the criminal character of their conduct by any jurisprudential test. They simply did not believe, at least initially, that they could fail to be victorious in the war and were oblivious of any legal constraints.

### The United States case of Ex Parte Quirin

The only judicial authority cited by the Tribunal in relation to the liability of individuals for crimes against the law of nations was the decision of the Supreme Court of the United States in Ex Parte Quirin, (1942) 317 U.S.

1. Eight trained German saboteurs were the petitioners. In the middle of 1942 they travelled in two German submarines from a port in Occupied France to the United States. They had been instructed by an officer of the German High Command to destroy war industries and war facilities in the United States, for which they or their relatives in Germany were to receive payments from the German Government. Shortly after their arrival in the United States they were apprehended by officers of the Federal Bureau of Investigation. The United States President issued an Order whereby a Military Commission was appointed to try the petitioners for offences against the law of war and the United States Articles of War. No issue was raised as to the culpability of the eight individuals on the basis of the acts of State doctrine. The sole question for decision was whether or not the detention of the petitioners for trial by a Military Commission was in conformity with the laws and Constitution of the United States. Nevertheless, two pronouncements of the Court, albeit essentially obiter, were relevant to the issue of the individual responsibility of enemy saboteurs.

First, in a passage, part of which was cited by the Nuremberg Tribunal, the Court states:

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals. And the President, as Commander in Chief, by his Proclamation in time of war has invoked that law. By his Order creating the present Commission he has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

Second, the Court added:

By a long course of practical administrative construction by its military authorities, our Government has ... recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission. This precept of the law of war has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that we think it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of the Fifteenth Article of War.

The importance of the decision in Ex Parte Quirin is that it was not argued that the saboteurs were immune from personal criminal liability. Further, the Court treated the case in all respects as one in which the saboteurs allegedly had violated international law and that their actions were justiciable in accordance with the law of the United States by the application of 'part of the law of nations'. The decision was simply that the Military Commission appointed by the President had jurisdiction to try the charges. The judgment of the Court was delivered by Chief Justice Stone, and was based on a long line of decisions of the Supreme Court.

## Conclusion

In the writer's view it is beyond doubt that, irrespective of the scope of the legislative authority of the Allied Powers following the unconditional surrender of Germany, the prescription in Articles 6 and 7 of the Nuremberg Charter of the responsibility of individuals was merely an application of established international law. Many respected writers have advanced this view. Thus, Professor Dinstein wrote in 1985:

The individual human being is manifestly the object of every legal system on this planet, and consequently also of international law. The ordinary subject of international law is the international corporate entity: first and foremost (though not exclusively) the State. Yet, the corporate entity is not a tangible res that exists in reality, but an abstract notion, moulded through legal manipulation by and within the ambit of a superior legal system. When the veil is pierced, one can see that behind the legal personality of the State (or any other international corporate entity) there are natural persons: flesh-and-blood human beings. In the final analysis, Westlake was undubitably right when he stated: 'The duties and rights of States are only the duties and rights of the men who compose them'.<sup>131</sup> That is to say, in actuality, the international rights and duties of States devolve on human beings, albeit indirectly and collectively. In other words, the individual human being is not merely the object of international law, but indirectly also its subject, notwithstanding the fact that, ostensibly, the subject is the international corporate entity.<sup>132</sup>

Professor Glueck expressed his view clearly and firmly:

It is perfectly obvious that the application of a universal principle of non-responsibility of a State's agents could easily render the entire body of international law a dead letter. For any group of criminally minded persons comprising the temporary Government that has seized power in a State could readily arrange to declare all of its violations of the law of nations -- either in initiating an illegal war or in conducting it contrary to the laws and customs of recognizedly legitimate warfare -- to be 'acts of State'. Thus all its treaty obligations and international law generally could be rendered nugatory; and thus the last law-abiding member of the Family of Nations could always have a weapon with which to emasculate the very law of nations itself. The result would be that the most lawless and unscrupulous leaders and agents of a State could never be brought to account.<sup>133</sup>

Mr. Justice Jackson put the issue in simple terms when he said in his opening address:

The idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.<sup>134</sup>

## TU QUOQUE

In the course of the trial at Nuremberg and in some subsequent criticism, attempts were made to invoke the argument of tu quoque against some of the Allied Powers as a result of their actions during the Second World War. It was asserted that war crimes and violations of international law were committed on both sides and that German armed forces were entitled to retaliate. Thus Dr. Exner, counsel for Jodl, submitted to the Tribunal:

Retaliation justifies an action which under normal circumstances would be illegal. That is to say, retaliation

then has this significance when the individual action is the answer to a violation of international law committed by the other side. .... it is entirely important in the judgment of a crime ... to consider the motive. If one does not know the motive of the action one cannot judge the action itself. And the bitterness which was started, purely psychologically, by the manner in which the war was conducted on one side and on the other, was the motive for actions which normally cannot be justified.<sup>135</sup>

The cited submission by counsel, although no examples were given, was based on the doctrine of reprisals in international law, and was directed at the admissibility of evidence sought to be tendered. It does not appear from the transcript that the Tribunal made any specific ruling on the submission, at that stage, although it is, of course, clear from the subsequent ruling (*infra*) and the judgment that it did not recognise the *tu quoque* argument.

After the war, some writers based their criticism of the Nuremberg judgment on the fact that it was Allied policy to attack civilian populations: for example, the destruction of Dresden, the fire-bombing of Hamburg and Tokyo and the atomic bombing of Hiroshima and Nagasaki. Professor Falk, a persistent critic of 'Nuremberg Law', wrote:

Standards of negative reciprocity were relied upon, namely, that the leaders of the defeated states brought before the bar of international justice were not charged with any actions – such as submarine attacks without prior warning or the a bombardment by air of enemy cities – that were also the common practice of the victorious side. Such forbearance at Nuremberg can be interpreted to mean that anything the victor does is beyond condemnation as criminal and that the defendant might succeed with a *tu quoque* argument. So interpreted, Nuremberg is deeply flawed if understood as moral education.<sup>136</sup>

The *tu quoque* argument was specious. It is not a defence in criminal proceedings,<sup>137</sup> and, in any event, it was not relevant at Nuremberg.

As the Tribunal ruled:

The question is, how can you justify in a trial of the major war criminals of Germany, evidence against Great Britain, or against the United States of America or against the U.S.S.R. or against France. If you are going to try the actions of all those four signatory powers, apart from other considerations, there would be no end to the trial at all, and their conduct has no relevance to the guilt of the major war criminals of Germany, unless it can be justified by reference to the doctrine of reprisal, and this cannot be justified in this way.<sup>138</sup>

The Tribunal applied the same reasoning in rejecting evidence relating to aerial attacks on alleged non-military targets.<sup>139</sup>

Professor Quincy Wright expanded the argument against the availability of the *tu quoque* doctrine at Nuremberg when he wrote:

... the equitable principle of 'clean hands' is not recognized as a defence in criminal trials. Whether or not statesmen or individuals of the United Nations have been guilty of any of the offenses for which the defendants were tried was not a question legally relevant to this trial, nor is it legally relevant to consider whether other persons who have not been indicted or who were not within the jurisdiction of the Tribunal may have been guilty of the same offenses. Unreasonable discrimination in initiating prosecution of persons probably liable under law applied is international law justice seems to call for a tribunal with jurisdiction over all persons subject to that law. Such justice, however, has never been realized. Courts applying international law have always had a more limited jurisdiction. It has not been considered unreasonable for the jurisdiction of national tribunals applying international criminal law to be limited to those whose acts were injurious to the state establishing the tribunal.<sup>140</sup>

## FURTHER CONSIDERATION OF THE INDICTMENT

The analysis of the Nuremberg indictment in Chapter 8 was designed to demonstrate some fundamental conclusions: first, it was based upon the substantive and procedural provisions of the London Agreement and Charter, and the duty of the Tribunal was to apply those provisions without being bound by the jurisprudence of

any particular national legal system; second, there was no legal justification for the inclusion of Count I in the indictment - the alleged common plan or conspiracy to commit the crimes alleged in the other three Counts -; third, Count 4 (Crimes against Humanity) unnecessarily enlarged the indictment and could have been embraced within Count (War Crimes).

In this section, further critical consideration will be given to the terms of the indictment.

#### The alleged conspiracy ( Count I )

The "Statement of the Offence" under Count I was a clear allegation of involvement of all of the accused in a common plan or conspiracy to commit all the categories of crimes charged in Counts 2, 3 and 4. The only qualification on this all-embracing allegation arose from the particulars in the statement of the individual responsibility of the defendants (Appendix A of the indictment).

The case of the accused FRITZSCHE, who was found not guilty "under the indictment" illustrates the confusion which resulted from the conspiracy pleading.

The particulars in the case of FRITZSCHE alleged that he used the positions he occupied and his personal influence:

to disseminate and exploit the principal doctrines of the Nazi conspirators set forth in Count One of the Indictment, and to advocate, encourage and incite the commission of the War Crimes set forth in Count Three of the Indictment and the Crimes against Humanity set forth in Count Four of the Indictment including, particularly, anti-Jewish measures and the ruthless exploitation of occupied territories.

The Tribunal began its statement of the reasons for its judgment in relation to Fritzsche with the words ' Fritzsche is indicted on Counts One, Three and Four'. After a summary of the official positions held by Fritzsche, importantly under the heading of 'Crimes against Peace', the Tribunal stated:

Never did he achieve sufficient stature to attend the planning conferences which led to aggressive war; indeed according to his own uncontradicted he never even had a conversation with Hitler. Nor is there any showing that he was informed of the decisions taken at these conferences. His activities cannot be said to be those which fall within the definition of the common plan to wage aggressive war as already set forth in this Judgment.

Under the heading of 'War Crimes and Crimes against Humanity', the Tribunal concluded:

It appears that Fritzsche sometimes made strong statements of a propagandist nature in his broadcasts . But the Tribunal is not prepared to hold that they were intended to incite the German people to commit atrocities on conquered peoples, and he cannot be held to have been a participant in the crimes charged. His aim was rather to arouse popular sentiment in support of Hitler and the German war effort .... the Tribunal finds that Fritzsche is not guilty under this indictment.

The cited extracts from the Tribunal's judgment, and the structure of the statement of its reasons, establish beyond any doubt that analytically it construed Count I as a separate substantive charge, cumulative, if established by the evidence, upon each of the three following Counts. For the reasons states in Chapter 8, that construction was contrary to the accepted scope of the concept of criminal conspiracy in civilised jurisdictions.

However, it is questionable whether the Tribunal was correct in stating that Fritzsche was indicted on Counts I, 3 and 4 . In the writer 's view, he was charged only under Count I, in accordance with the particulars of his alleged individual responsibility. The words '... he cannot be held to have been a participant in the crimes charged' [emphasis added] are referable, as a matter of construction, to the word 'participated' in the second line of Count I.

For the purpose of the inclusion of the conspiracy count in the indictment and the pleading of conspiracy within Counts 3 and 4 was obviously to ensure that the scope of admissible evidence would be as broad as possible. In practical terms, the allegation of conspiracy encompassed the conduct and activities of all the alleged major war

criminals over a very long period and linked them together. It is the writer's view that the conspiracy count was not necessary and that the course of justice could have been pursued, in accordance with the Moscow Declaration of 30 October 1943, just as effectively if it had been omitted.

#### Crimes against peace

Count 2 of the indictment charged all the defendants with crimes against peace, the jurisdictional validity of which has been argued by the writer in the section of this Chapter relating to the legal status of Germany after its unconditional surrender on 8 May 1945.

Count 2 was simply expressed. It was not complicated by any allegation of conspiracy. The charge was confined to actual participation. In the planning, preparation, initiation and waging of wars of aggression, which, it was alleged, were also wars in violation of international treaties, agreements and assurances. Thus it was a clear application of Article 6 (a) of the London Charter. Once the validity of that provision in the Charter is accepted, as the writer argues it should be, the pleading in Count was unobjectionable.

It should be borne in mind that although the terms of Count were brief, they involved the twelve wars of aggression which it was alleged Germany had initiated between 1 September 1939 and 11 December 1941. This fact is an additional argument for the view that the pleading of a conspiracy was unnecessary.

#### War crimes



## NOTES

1. For a succinct discussion of the tenets of adherents to the principal legal philosophies, see Bosch, Judgment on Nuremberg, The University of North Carolina Press, 1970, pp. 40-66. Professor Bosch identified the following categories: legal positivism, the natural-law proponents, the pragmatic or sociological school, and those who espoused a natural law philosophy but applied it in the manner enunciated by Hugo Grotius. Bosch, op. cit., pp. 60-61, referred to the assertions of international lawyers who, whether they approved of the Tribunal or not, 'agreed that the Nuremberg court was based on a natural-law philosophy'. He added: 'Moreover, the language of the judges and the prosecution, the concepts and principles of the court, all revealed the pervasiveness of this legal system at the trials.' However, Bosch acknowledged that the Prosecution did not adopt natural-law principles 'in a doctrinaire manner, but in a typically American practical adaptation of assumptions to the situation.' He cited the following extract from a letter by General Taylor to him, dated 14 May 1965 (op. cit., p. 61, footnote 61):  
  
I have no training in jurisprudence, and therefore hardly feel that I am qualified to comment on your inference that I assume 'the legal principles of the Grotian or naturalist legal philosophy of international law.' My conceptions about the war crime trials were formulated ad hoc, as I went along.
2. Wright, 'Legal Positivism and the Nuremberg Judgment', (1948) 42 A.J.I.L., p. 405.
3. See Bosch, op. cit., p. 40, footnote 1: 'In the twenty years after the major Nuremberg trials, at least thirty books by international lawyers have considered the Tribunal, the London Charter or the Nuremberg principles. Of these thirty writers, twenty one were favourable to the court, six condemnatory, and three attempted an objective recital of the facts. In articles appearing in the semi-official publication, The American Journal of International Law, seventeen different authors evaluated the Tribunal. Twelve writers approved (some with qualifications), and three disapproved of the legal proceedings, while two refused to pass judgment.'
4. Schwarzenberger, 'The Problem of an International Criminal Law', (1950) 3 Current Legal Prob., p. 293. But contrast the approach of Glaser, (1970) Droit International Penal Conventionelle, p. 16, in which that author discusses violations of the precepts of public penal international law.
5. Jescheck, 'International Criminal Law: Its Object and Recent Developments', as published in Bassiouni and Nanda, A Treatise on International Criminal Law, Charles C. Thomas, Illinois, U.S.A., 1973, pp. 49-76.
6. Glueck, War Criminals: Their Prosecution and Punishment, Alfred A. Knopf, New York, 1944, Preface, p. vii.
7. History of U.N.W.C.C., p. 16.
8. Lauterpacht, 'The Sources of International Law', Selected Papers, Edited by E. Lauterpacht, Q.C., Cambridge, 1970, pp. 51-135.
9. Ibid., p. 51.
10. Ibid., p. 52.
11. Ibid., p. 53.
12. Ibid., pp. 55-77.
13. Ibid., p. 134 and footnote 5.
14. Bernhardt, 7 E.P.I.L., 'Customary International Law', pp. 61-66, at p. 65.
15. Frowein, 7 E.P.I.L., 'Jus Cogens', pp. 327-330.

16. Ibid., p. 330.
17. Maugham, U.N.O. and War Crimes, John Murray, London, 1951, pp. 83-86.
18. See Professor F.H. Lawson, The Rational Strength of English Law, The Hamlyn Lectures, Third Series, Stevens & Sons Limited, London 1951: '... the genius of the common law is quite different [from codified systems of law]. It is of its nature to spread without any predetermined limits'.
19. The theme of this criticism is developed later in this Chapter.
20. For text, see (1945) 39 A.J.I.L., Supp. pp. 169-170. Jodl, who was later sentenced to death at Nuremberg following his conviction on all four Counts, signed the instrument on behalf of the German High Command. Almost contemporaneously, a substantially similar instrument of surrender was signed at Berlin (see (1945) 39 A.J.I.L., Supp., pp. 170-171). Formal instruments of unconditional surrender were signed in all theatres of war. On 2 May an instrument of unconditional surrender of German and Italian Forces had been executed at Caserta, in respect of the Mediterranean theatre of operations (see (1945) 39 A.J.I.L., Supp., pp. 168-169).
21. See Bassiouni, International Crimes: Digest/Index of International Instruments 1815-1985, Vol. 1, pp. 228-230. See also 68 U.N.T.S., 189, and Cmd. 6648. The Declaration was supplemented by an agreement issued by the Allied Control Council on 20 September 1945, whereby additional requirements were imposed on Germany.
22. Bassiouni, ibid., p. 229, directly links Article 11 with the London Agreement and Charter of 8 August 1945, which the Declaration was 'designed to implement'. Bassiouni, idem., describes the penal characteristics of Article 11 in these terms: 'Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish or the like ...'. Such recognition is one of the ten characteristics which, in Bassiouni's view, qualify a multilateral instrument as part of international criminal law and consequently make the prohibited conduct an international crime (op. cit., pp. 1v-1vi).
23. Padfield, The Last Fuhrer, first published in Great Britain by Victor Gollancz, 1984, p. 454.
24. Ibid., pp. 477-478, footnote 53.
25. Nuremberg Trial, I.M.T., vol. VIII, pp. 353-356.
26. Albert Speer, Inside the Third Reich, Bonanza Books, New York, 1970, p. 468, wrote: 'Strictly speaking, Doenitz could not claim that his succession to Hitler was constitutionally legal, since the constitution of the German Reich would have required an election. Rather, his legitimacy as Hitler's successor was based on his predecessor's charisma, a fact which Doenitz confirmed in his public acts, by constantly invoking Hitler's last will and testament'. Dr Kurt V. Laun, of Hamburg, Germany, writing in 1951 in 45 A.J.I.L., 'The Legal Status of Germany', p. 267, expressed doubts as to whether Doenitz was Hitler's legal successor. However, the expressed reasons for this view appear equivocal. Dr. Laun acknowledged in the article that Hitler had been recognised by all foreign governments and that during World War II that recognition had not been withdrawn. In seeming contradiction to his cited view, Dr. Laun wrote in the same article (p. 275) that 'there existed at the time of the capitulation of the German Supreme Command, German representatives exercising supreme authority with respect to Germany. These representatives were the Doenitz government, assisted by the Supreme Command, the military organisation and the administrative body.' Dr. Laun criticised the Allied Powers for 'preventing the German Government from exercising their functions and even taking all the members prisoner'. This author finds the argument circuitous.
27. See 'Note on the Nuremberg Trials', (1946) 62 L.Q.R., pp. 229-233.
28. See Randall L. Bytwerk, Julius Streicher: the Man Who Persuaded a Nation to Hate Jews, Stein and Day, New York, 1983. This is a vivid account of the total dedication of Streicher over a period of nearly 25 years, through the weekly newspaper Der Sturmer, to the task of indoctrinating the German nation with the evilness of world Jewry and thus at least accepting the Holocaust. He was not close to Hitler

in the sense in which Goebbels, Goering and Bormann, for example, were, but he was fully aware of Hitler's anti-Semitic views as exposed in Mein Kampf, and was a willing, fanatical and highly successful tool of Hitler. Streicher was convicted on only one count, Crimes against Humanity, and sentenced to death.

29. I.M.T. Judgment, p. 38.
30. Nuremberg Trial, I.M.T., vol. I, p.95.
31. I.M.T. Judgment, p.38.
32. Nuremberg Trial, I.M.T., vol XIX, p.398.
33. Stone, op. cit., p.359.
34. Idem.
35. Idem., footnote 57a.
36. Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin', (1945) 39 A.J.I.L., pp. 518-526.
37. For details of the establishment of the Military Government Courts, their jurisdiction and the laws they applied, see E.E. Nobleman, an officer of the United States Department of Justice, (1946) 40 A.J.I.L., pp. 803-811.
38. Wright, 'The Law of the Nuremberg Trial', (1947) 41 A.J.I.L., pp.38-72, at pp. 50-51.
39. The theories referred to in the text are mentioned briefly by T.Schweisfurth in E.P.I.L., 'Germany, Occupation After World War II', pp. 191-198. However, they are not attributed to any named persons and are essentially purely theoretical. They do not illuminate the real issue.
40. Oppenheim, International Law, 7th Edn., edited by Lauterpacht, 1952, vol. II, pp. 552-553. And see ibid., pp. 602-604.
41. ?
42. Smith, The American Road to Nuremberg, op. cit., p. 86 (Document 27).
43. For example, Dr. Laun, (1951) 45 A.J.I.L., pp. 268-285, argued strongly that Germany still existed as a state and that the Hague Regulations still applied to the occupation of the country, because the Reich had not been annexed. In what seems a paradox, Dr. Laun concluded his article thus: 'Germany, because she has no representative organs of her own, cannot yet act under international law, although she is a subject of international law. Because of this she has been called a dependent state'. See also Woetzel, op. cit., pp. 78-95, in which that author refers to the views of Dr. Laun and many other writers on opposite sides of the debate on the issue. Professor Woetzel expressed his ultimate view thus (op. cit., p.95): 'It is evident, therefore, that international sanction constitutes the most important condition for the legal character and the legal basis of the Nuremberg trial. With it, the I.M.T. can certainly be regarded as an institution sanctioned under international law. It was clearly entitled to take jurisdiction over the German war leaders'.
44. Schwarzenberger, op. cit., p. 165.
45. Schwarzenberger, op. cit., p. 318. And see, ibid., at p. 109 et. seq., Schwarzenberger's discussion of the standard of civilisation.
46. Korovin, 'The Second World War and International Law', (1946) 40 A.J.I.L., pp. 742-755. Professor Korovin was Professor of International Law, University of Moscow, and the Juridical Institute of the Ministry of Justice, a Colonel of Justice and a lecturer on international law in the Soviet Army.

47. E.H. Feilchenfeld, The International Economic Law of Belligerent Occupation, Carnegie Endowment for International Peace, Washington, 1942.
48. (1944) 60 L.Q.R., p. 95.
49. Fraenkel, Military Occupation and the Rule of Law: Occupation Government in the Rhineland, 1918-1923, Oxford University Press, 1944.
50. (1946) 62 L.Q.R., p. 96-98.
51. Prompe, Aggressive war an International Crime, Marinus Nijhoff, The Hague, 1953.
52. Ibid., p. 239.
53. Ibid., pp. xiii-xiv.
54. Hankey, op. cit., pp. 51-52.
55. Morgan, op. cit.
56. Morgan, ibid., Preface (by Viscount Maugham), p. vi.
57. (1947) 41 A.J.I.L., p. 22.
58. Mossner, 3 E.P.I.L., pp. 269-274, at p.270.
59. Idem.
60. Frowein, 4 E.P.I.L., pp. 141-146.
61. Ibid., p.142.
62. Ibid., p.144.
63. Idem.
64. Ibid., p. 145.
65. ?
66. I.M.T. Judgment, p.
67. The Tribunal's reliance on the decision of the Supreme Court of the United States in Ex Parte Quirin is discussed later in the text of this Chapter.
68. I.M.T. Judgment, p.
69. Lüders, loc. cit., p. 134.
70. Pollock, The Expansion of the Common Law, Rothman Reprints Inc., New Jersey, 1974, pp. 119-120. And cf. the Moscow Declaration of 30 October 1943.
71. Ibid., pp. 120-121.
72. The Court cited the following extract from the case of the Eastern Extension Australasia and China Telegraph Co. Ltd., 9 November 1923, decided by the British-American Arbitral Tribunal, under the Convention of 18 August 1910, Nielsen's Report, pp. 75-76, quoted by Lauterpacht, The Function of Law in the International Community: 'International law, as well as domestic law, may not contain, and

generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles ... This is the method of jurisprudence; it is the method by which law has been gradually evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals'.

73. Woetzel., *op. cit.*, p. 216.
74. Glueck, 'The Nuremberg Trial and Aggressive War', (1946) 59 Harvard Law Review, 396-456, p. 418. In reaching his cited conclusion, Professor Glueck traced the development, in a jurisprudential sense, of many crimes which, without any statutory basis, had for centuries been recognised as such: 'In England, even the most serious offences (e.g. murder, manslaughter, robbery, rape, arson) originated by way of usage. From the earliest times of legal development, both before and after prosecution in the royal courts for violations of the "King's peace" had taken the place of the ancient practices of private vengeance, the Wergild and trial by ordeal, such customary crimes were recognised; and when the King's courts took over, they accepted common-law crimes without specific prior statute or royal decree.' (*loc. cit.*, p. 417, footnote 72).
75. Nuremberg Trial, I.M.T., vol. II, p. 147. Justice Jackson emphasised in his opening address that the 'validity of the provisions of the Charter is conclusive' and that 'this declaration of the law by the Charter is final' (*loc. cit.*, p. 143). The Tribunal was of the same view. It is submitted that there the issue should have rested.
76. Taylor, 'Robert H. Jackson and the Nuremberg Trials', (1955) 55 Columbia Law Review, pp. 488-525, at p.516.
77. N.M.T., vol. II, p. 487.
78. I.M.T. Judgment, p. 40.
79. I.M.T. Judgment, p. 38.
80. U.N.O., 35th plenary meeting, Verbatim Record of the General Assembly, pp. 699-700.
81. Taylor, *ibid.*, pp. 516-517. And see Eppstein, The Catholic Tradition of the Law of Nations, London, 1935, p. 262, in which the author quotes from Suarez, De Legibus ac de Deo Legislatore, Lib. II, Cap. XIX, para. 6: 'The Precepts of the Law of Nations differ in this from those of civil law, that they are not in writing, but in customs not of any one city or province, but of all or almost all nations. For human law is twofold, written and unwritten. ... But unwritten law is deduced from customs: ... if it is introduced by the customs of all nations and binds all, we believe this to be the Law of Nations properly speaking.'
82. Glueck, *ibid.*, p. 418, this chapter *sitra*, and footnote 74.
83. Glueck, *ibid.*, pp. 408-409. Glueck points out, *ibid.*, footnote 44, that care was taken in the Hague Convention (IV) to provide that until a more complete code of laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.'
84. I.M.T. Judgment, p. 40.
85. Idem.
86. Glueck, *ibid.*, p. 411.
87. Ruckerl, *op. cit.*, pp. 37-38.

88. Ibid., p. 39.
89. Nuremberg Trial, I.M.T., vol. XIX, p. 398. See also Jackson, loc. cit., vol. II, p. 99: 'This Tribunal, while it is novel and experimental, is not the product of abstract speculations nor is it created to vindicate legalistic theories. This inquest represents the practical effort of four of the most mighty of nations, with the support of 17 [sic] more, to utilize international law to meet the greatest menace of our times -- aggressive war.'
90. Oxford English Dictionary, vol. I, p. 1097.
91. I.M.T. Judgment, p. 38.
92. Schwarzenberger, op. cit., p. 471.
93. Major W.B. Cowles, Judge Advocate General's Department of the United States Army, 'Trial of War Criminals by Military Tribunals', American Bar Association Journal, vol. 30, June 1944, p. 330 (see Chapter 7, footnote 2); Morgan, op. cit., p. 8; and see also Finch, loc. cit., p. 21.
94. I.M.T. Judgment, p. 38.
95. Schwarzenberger, op. cit., p. 472. Schwarzenberger analysed the provisions of both Charters. The analysis was not critical, except in the following respect: '... the greater number of the judges held judicial -- and some of them high judicial -- offices in their own countries. What those who drafted the Charters took perhaps too lightly for granted was that legal eminence in a national legal hierarchy necessarily implied a commensurate knowledge of international law'. And see this author's survey in Chapter 10 of the procedural and evidential fairness of the trial at Nuremberg pursuant to the Charter.
96. For example, see and cf. R.H. Minear, Victors' Justice : The Tokyo War Crimes Trial, Princeton University Press, 1971. For a contrary view relating to 'neutral judges', see Lauterpacht, (1944) 21 B.Y.I.L., pp. 58-95, at p. 81.
97. I.M.T. Judgment, pp. 39-40.
98. Ibid., p. 41.
99. Nuremberg Trial, M.T. vol. III, p. 103.
100. Ibid., p. 104.
101. (a) Sir David Maxwell-Fyfe, in a foreword to R.W. Cooper, The Nuremberg Trial, Penguin Bookshop. p. 9.  
  
 (b) Oppenheim, op. cit., pp. 177-197. That author stated (pp. 191.-192): 'As in the case of other international obligations, the absence of specific provisions for sanctions does not affect the legal character of the Pact. Neither does it affect the criminality, as distinguished from mere illegality, of violations of the Pact. The essence of a criminal act, as distinguished from a contractual or tortious wrong actionable at the instance or the injured party, is the fact that it injures, and is punishable by, the community at large. Nor are the seriousness, the destructiveness, and the heinousness, of the act irrelevant to the question of the determination of its criminal character. Judged by these tests, the premeditated violation of the Pact of Paris constitutes an international crime. It is no longer a question of aggressive war in general, i.e. a war undertaken in violation of an express undertaking. It is a question of a war undertaken in breach of a fundamental treaty which has dethroned war as an international prerogative of the sovereign State'.  
  
 (c) Calvo-coressi, op. cit., p. 36: 'The Pact of Paris did not follow previous instruments in saying in so many words that aggressive war was an international crime, but it is difficult to avoid the conclusion that it said so in different words. The word 'condemn,' used in article I, is a strong word which, coupled with the background provided by earlier instruments and the 'renunciation' which follows in the same article, implies prohibition rather than a simple bargain which may be evaded at the cost of paying

damages for breach of contract. In practice, of course, war being what it is, the purely contractual interpretation of the Pact of Paris reduces that instrument to nonsense and its framers and signatories to the status of blind and futile dilettantism. There is a salutary rule that where in interpreting a document a court is faced with alternatives, one of which enables the document to make sense and to have effect while the other makes the document ineffective and meaningless, the court shall choose the former'.

102. (a) Glueck, *loc. cit.*, p. 397, footnote 8: 'Further reflection upon the problem has led the writer to the conclusion that for the purpose of conceiving aggressive war to be an international crime, the Pact of Paris may, together with other treaties and resolutions, be regarded as evidence of a sufficiently developed custom to be acceptable as international law', pp. 403-406, Appendix, pp. 455-456.  
  
(b) Stone, *op. cit.*, p. 300, identified six respects in which the Pact 'still left the customary liberty to resort to war unaffected' (see this Chapter, footnote 105).  
  
(c) Brownlie, *op. cit.*, p. 83, argued that the legal character of the obligations created by the Pact must be asserted: 'A minority of writers on international law have denied this legal character. ... Another argument against the legal character of the Pact is based on the absence of sanctions in the nature of mutual assistance and armed action to suppress acts infringing the Pact. ... The most significant fact is the assumption by the negotiators and signatories that a legal obligation was to be the result.'
103. (a) Woetzel, *op. cit.*, pp. 143-153, 158, 164, 165, 166, 167, 170, 186, 223.  
  
(b) Cynthia D. Wallace, 3 E.P.I.L., pp.236-239
104. (a) Viscount Maugham, *op.cit.*, pp.64-80.  
  
(b) Pompe, *op.cit.*, pp.155-164.  
  
(c) Finch, *loc.cit.*, pp.29-34. That author concludes (p.33) that in the light of the legislative history of the official attitude of the government of the United States towards the interpretation of the Pact of Paris it is 'impossible to accept the thesis of the Nuremberg Tribunal'. (see this Chapter, footnotes 108 and 109).  
  
(d) Bassiouni, *op. cit.*, p. 2. Bassiouni stated that the Treaty of Locarno and the Pact of Paris 'were among the legally modest bases on which rested the heavy artful legal construction of the prosecution'.  
  
(e) Schwarzenberger, *op. cit.*, pp. 491-495. That author stated (p. 492): 'While it is self-understood that a breach of the Kellogg Pact is a breach of a treaty, and any breach of treaty constitutes an international tort, the further legal consequence attached to acts of aggression, that is, that they are crimes akin to war crimes in the strict sense [an analogy which was used by the Tribunal in its judgment, p. 40], does not necessarily follow from the illegality of a breach of treaty. Whether this is so or not depends on the intention of those who have established such a consensual quasi-order... Actually, the Treaty itself strongly suggests the opposite conclusion.'  
  
(f) For a scholarly examination of the legal effect of the Pact of Paris, see the submissions to the Tribunal by Professor Jahrreiss, counsel for Jodl, *Nuremberg Trial*, I.M.T., vol. xvii, pp. 461-472.
- 105 Stone, *op. cit.*, p. 300 (footnotes 15 to 20), thus described the omissions from the scope of the Pact: 'Even this Pact, however, which came into force for virtually all States in the world, still left the customary liberty to resort to war unaffected in the following respects. First, all the Signatories reserved the liberty of self defence. Second, war to enforce international obligations, for instance under the old Covenant, or the present Charter, not being "an instrument of national policy", was not forbidden. Third, the absence of machinery for authoritative determination of breach left a wide discretion! to States both under the Pact and the Covenant, leaving a path of evasive escape into the customary liberty. Fourth, only "war" was condemned, and the definition of "war" being difficult, States were able to exploit this difficulty by resorting to hostilities under some other name. Fifth, the renunciation of war by Signatories being only "in their relations with one another", resort to war with non-Signatories was not prohibited; nor, sixth, were wars against Signatories violating the Pact. In the light of these gaps,

the fact that the theoretical scope of the Pact did not prevent widespread hostilities throughout the following decade, leading into the Second World War, is not surprising'.

106. I.M.T. Judgment, p. 39.
107. *Ibid.*, pp. 39-40
108. Maugham, *op. cit.*, p. 70.
109. Stimson and Bundy, On Active Service in Peace and War, Harper Brothers, 1948, p. 158.
110. I.M.T. Judgment, pp. 40.
111. Bassiouni, *op. cit.*, p. 2.
112. I.M.T. Judgment, pp. 38-39.
113. In the 'High Command Case' in the 'Subsequent Proceedings' at Nuremberg the Tribunal stated: 'We think it may be said the basic law before mentioned [that is, the London Charter] simply declared, developed, and implemented international common law. By so construing it, there is eliminated the assault made upon it as being an ex post facto enactment' I.M.T., vol. II, pp. 476-477).
114. For examples, see Nuremberg Trial, T.M.T.: Professor Jahrreiss, counsel for Jodl, vol. XVII, p. 480; Dr. Stahmer, counsel for vol. XVII, p. 505; Dr. von Ludinghausen, counsel for von vol. XIX, p. 219; Dr. Seidl, counsel for Hess, vol. XIX, It is of interest to note that nearly twenty years after the Nuremberg judgment, Dr. Pannenbecker, chief counsel for Frick, maintained his argument in respect of ex post facto legislation: (1965) DePaul Law Review, pp. 348-358, at p. 350.
115. Brownlie, *op. cit.*, p. 193, footnote 6.
116. Dunbar, 'The Maxim Nullum Crimen Sine Lege in the Law of War', (1959) 71 Juridical Review, pp. 176-196, at p. 177. That author added (*ibid.*, p. 178): 'Furthermore, on August 20, 1942, Hitler issued the following decree: "A strong administration of justice is necessary for the fulfilment of the tasks of the Great German Reich. Therefore, I commission and empower the Reich Minister of Justice to establish a National Socialist Administration of Justice and to take all necessary measures in accordance with my directives and instructions made in agreement with the Reich Minister and Chief of the Reich Chancellery and the Leader of the Party Chancellery. He can hereby deviate from any existing law".' In the cited article, Professor Dunbar summarised his views thus (*ibid.*, p. 195): '... (3) The maxim nullum crimen sine lege, although widely accepted as a fundamental principle of justice, should not become an instrument of injustice by imposing an arbitrary limitation upon State sovereignty. In practice, therefore, special circumstances may make it necessary or expedient temporarily to suspend or modify the wholehearted observance of this principle. (4) The doctrine is of no real significance in international law in the case of murder and other heinous crimes, particularly when the latter are committed on a large scale in pursuance of an organised national policy'. In a reference to the law of 28 June 1935, Professor Campbell, (1946) 62 L.Q.R. 141, pp.149-150, added this purport of its provisions: 'If there is no penal law directly covering an act it shall be punished under a law of which the fundamental conception applies most nearly to the said act'. Professor Campbell added: 'This introduces what has been called the principle of crime by analogy. ... whether the Nazis interpreted the principle of analogy in a wide or a narrow sense the important thing is that they introduced it into a system of criminal law which had not known it before. It was not enough that the police should have practically boundless power of arrest, imprisonment, torture and execution without trial; the ordinary criminal law, like every other branch of the law, must be made flexible and pliable so that it could be shaped at any moment to whatever ends of policy the Leaders conceived to be in the interests of Germany'.
117. Dunbar, *loc.cit.*, p.178.
118. For examples see:



(a) Stone, *op.cit.*, pp.359-360: 'The question of general retroactivity of the Nuremberg counts must ... be regarded as a question of substantial justice and policy, and not of law in the strict sense. The injustice involved is that of arbitrary changes in the legal consequences of men's acts after the acts occur, and in particular the punishment of acts the guilt of which the actor could not have known at the moment of commission'; Stone, *op. cit.*, Discourse 20, pp. 368-371, in which that writer stated: '... The maxim is not as such a rule, much less an overriding rule. of legal systems generally';

(b) Schwarzenberger, *op. cit.*, pp. 23-27. That author's discussion of the issue was ambivalent. Although critical of the reasoning of the Tribunal, Professor Schwarzenberger stated: 'If the Tribunal had wished to consider the argument of *ex post facto* law on its merits, it might have been expected to tackle the issue from the point of view of comparative law [*sed quaere*]. It would probably have found that while liberal and individualistic systems of municipal law view retroactive penal laws with disfavour, even they have not always been able to dispense altogether with this device'. This writer regards the following arguments of Professor Schwarzenberger as curious: 'It is not necessary to dwell unduly on the relapse of the Nuremberg Tribunal into law-making by reference to natural law; for, in view of the clear provisions of the Charters of London and Tokyo, the efforts of the Tribunal in this respect were entirely supererogatory. More likely than not, the Nuremberg and Tokyo Tribunals invoked the general principles of justice to cover their own uneasiness over the departures of their Charters from a strong Western legal tradition in creating retrospectively the war crimes against peace and humanity'. The view of this writer is that in his cited criticism of the Tribunal, Professor Schwarzenberger failed to address the question of whether or not the Nuremberg Charter itself lacked validity to the extent to which it prescribed *ex post facto* law. That question was critical, rather than the manner in which the Tribunal dealt with the issue.

(c) Writing in February 1946, Professor Glueck foreshadowed the reasoning of the Tribunal: (1946) 59 Harvard Law Review, pp.396-456. He stated (pp.416-418): 'During the early stage (or a particularly disturbed stage) of any system of law -- and international law is still in a relatively undeveloped state -- the courts must rely a great deal upon non-legislative law, and thereby run the risk of an accusation that they are indulging in legislation under the guise of decision, and are doing so *ex post facto*. Whenever an English common-law court for the first time held that some act not previously declared by Parliament to be a crime was a punishable offence for which the doer of that act was now prosecuted and held liable, or whenever a court, for the first time, more specifically than theretofore defined the constituents of a crime and applied that definition to a new case, the court in one sense 'made law'. Yet, fundamentally, it thereby did no violence to the technique of law-enforcement or the requirements of man-made justice, unless it acted most unreasonable and arbitrarily. Even the legal 'command' which, since Austin's time is deemed by many to be the indispensable and distinctive hallmark of law, was essentially present. It is true that the command which the accused was held to have violated did not come directly and specifically from the legislature or sovereign; but since the prohibition represented the consensus of the people as reflected in customary usage, it contained enough of the imperative element to warn its prospective violators, to impel judges to recognize it as an existing part of the law of the land, and to hold its violators guilty of a crime.'

(d) Professor Quincy Wright expressed a positive view in (1947) 41 A.J.I.L., at p. 59: 'Considering international law as a progressive system, the rules and principles of which are to be determined at any moment by examining all its sources (general principles of law, international custom, and the teachings of the most highly qualified publicists no less than international conventions and judicial decisions) there can be little doubt that international law had designated as crimes the acts so specified in the Charter long before the acts charged against the defendants were committed.'

119. See London Conference records, 23 July 1945, p. Schwarzenberger, *op.cit.*, p. 480.

120. ?

121. Rauschnig, *Hitler Speaks*, Thornton Butterworth Ltd., London, 1939, p.21.

122. See Gregory, 'Murder is Murder and the Guilty can be Punished', (1946) 32 American Bar Association Journal, pp.544-549, at p.548: 'The vice of prosecution under *ex post facto* laws is that these laws work a grave injustice and injury upon innocent persons who have acted in good faith, in reliance on the law as it existed when they acted, and whose acts, although later declared to be criminal, when done were not unlawful or immoral. by no stretch of the imagination could any reasonable person look upon the

depraved conduct of the Nazis as innocent. It is certain that they did not rely on any possible immunity existing under international law as then in force or generally accepted'.

123. Woetzel, op.cit., p.68.
124. Ibid., p.69.
125. Kelsen, op.cit., p.99.
126. For example, the authors cited in Woetzel, op. cit., p. 71, footnote 38. By contrast, Professor Jescheck argued that the practice of States did not confirm that war crimes were an exception to the acts or state doctrine (see Jescheck's work published in 1952 in the German language, p. 166, cited by Woetzel, op. cit., p. 71, footnote 40).
127. See Woetzel, op. cit., p. 72, footnotes 43 and 44.
128. I.M.T. Judgment, p. 102.
129. Ibid., p. 41.
130. Ibid., p.42
131. Westlake, Collected Papers, Cambridge University Press, edited by Oppenheim, 1914, vol. I, p.78.
132. Dinstein, 'International Criminal Law', (1985) 20 Israel Law Review, pp.206-242 at p.1.
133. Glueck, loc.cit., p.428.
134. Nuremberg Trial, I.M.T., vol. II, p.150. And see ibid., vol.III, per Sir Hartley Shawcross (opening address) pp.105-106 and, by the same advocate (closing address) ibid., vol. XIX, pp.462-465.
135. Nuremberg Trial, I.M.T., vol. VIII, pp.182-183. and see ibid., vol. IX, pp.322-326 and p.673 et.seq.
136. Falk, 'Nuremberg: Past, Present, and Future', (1971) 80 Yale Law Journal, 1501-1528, at p.1510.
137. Wharton, Criminal Law, pp.138, 139.
138. Nuremberg Trial, I.M.T., vol.IX, p.688.
139. Idem.
140. (1947) 41 A.J.I.L., at p.46. See also (1946) 62 L.Q.R. at p.231 ('Note on the Nuremberg Trials' by an unidentified writer).

## BIBLIOGRAPHY

- Bassiouni, International Crimes: Digest/Index of International Instruments 1815-1985, Vol. 1, pp. 228-230.
- Bassiouni, International Criminal Law: A Draft International Criminal Code, Sijthoff and Noordhoff, The Netherlands, 1980.
- Best, G., 'Nuremberg and After: The Continuing History of War Crimes and Crimes Against Humanity', The Stenton Lecture 1983, University of Reading, 1984, pp. 3-4
- Biddle, F., 'The Nuremberg Trial' (1947) 33 Virginia Law Review, 679
- Bosch, Judgement on Nuremberg, University of North Carolina Press, Chapel Hill, 1970
- Braithwaite, Corporate Crime and Punishment in the Pharmaceutical Industry, Routledge & Kegan Paul, London, 1984
- Brownlie, International Law and the Use of Force by States, Clarendon Press, Oxford, 1963
- Bytwerk, R.L., Julius Streicher: the Man Who Persuaded a Nation to Hate Jews, Stein and Day, New York, 1983. 29.
- Clavocressi, Nuremberg: The Facts, the Law and the Consequences, Chatto and Windus, London, 1947
- Cowles, W.B., 'Trial of War Criminals by Military Tribunals', American Bar Association Journal, vol. 30, June 1944, p. 330
- Dinstein, 'International Criminal Law', 20 Israel Law Review, (1985) p.206
- Dinstein, The Defence of 'Obedience to Superior Orders' in International Law, A.W. Sijthoff, Leyden, 1965
- Dunbar, 'The Maxim Nullum Crimen Sine Lege in the Law of War', (1959) 71 Juridical Review, pp. 176-196, at p. 177.
- E.H. Feilchenfeld, The International Economic Law of Belligerent Occupation, Carnegie Endowment for International Peace, Washington, 1942.
- Ehardt, Dr. H., 'Nuremberg Law', (1949) 43 A.J.I.L., 223 (republished)
- Falk, 'Nuremberg: Past, Present, and Future', 80 Yale Law Journal, (1971) 1501
- Feldbrugge, Soviet Criminal Law: General Part (Law in Eastern Europe, No.9), Leyden: A.W. Sijthoff, 1964, Library of Congress Catalogue Card Number 64-22594
- Ferencz, 'Less than Slaves', Harvard University Press, Cambridge, Massachusetts, 1979
- Ferencz, An International Criminal Court: A Step Toward World Peace (1980) Oceana Publications Inc., New York
- Ferencz, Defining International Aggression: The Search for World Peace (1975) Oceana Publications Inc., New York
- Ferencz, Enforcing International Law: Way to World Peace (1983) Oceana Publications Inc., New York

- Finch, G. A., (Editor-in-Chief), The Nuremberg Trial and International Law, (1947) 41 A.J.I.L., 20
- Fraenkel, Military Occupation and the Rule of Law: Occupation Government in the Rhineland, 1918-1923, Oxford University Press, 1944.
- Glueck, The Nuremberg Trial and Aggressive War, Alfred A. Knopf, New York, 1946
- Glueck, War Criminals: Their Prosecution and Punishment, Alfred, A. Knopf, New York, 1944
- Goodhart, 'The Legality of the Nuremberg Trials', (1946), 58, Juridical Review, 1
- Gregory, 'Murder is Murder and the Guilty can be Punished', (1946) 32 American Bar Association Journal, pp.544
- Hankey, Politics Trials and Errors, Pen-in-Hand Publishing Co. Ltd., Oxford, 1950
- Hitler, A. Mein Kampf, 41st edn., Munich, 1933
- Jackson, M.W., 'The Man', Bulletin of the Australian Society of Legal Philosophy, (1985), vol.9, No.34
- Jackson, Nuremberg and Vietnam: An American Tragedy, New York Times Company, 1970
- Jackson, R.H., Report to the President, Department of State, United States of America, Publication 2420, European Series 10, United States Government Printing Office, Washington, 1945.
- Jescheck, 'International Criminal Law: Its Objects and Recent Developments', as published in Bassouini and Nanda, A Treatise on International Criminal Law, Charles C. Thomas, Illinois, U.S.A., 1973
- Johnson, D.H.N., The Protection of the Human Being in Armed Conflicts, address to seminar on International Humanitarian Law, Canberra, A.C.T., 1983
- Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin', (1945) 39 A.J.I.L., pp. 518-526.
- Khan, Rahmatullah, Indian Journal of International Law, (the official organ of the Indian Society of International Law) 1979, vol. 19, pp.552
- Klaestad, of the International Court of Justice, in South-West Africa Voting Procedure Case, (1955) 16 I.C.J. Reports, p.88
- Korovin, 'The Second World War and International Law', (1946) 40 A.J.I.L., pp. 742-755.
- Laun, Dr Kurt V., 'The Legal Status of Germany,' 1951 in 45 A.J.I.L. p. 267
- Lauterpacht, The Sources of International Law, Selected.Papers, Edited by E. Lauterpacht, Q.C., Cambridge, 1970, pp. 51-135.
- Lauterpacht, H., 'Rules of Warfare in an Unlawful War' in Law and Politics in the World Community, George A. Lipsky (ed.), University of California Press, Berkeley and Los Angeles, 1953;
- Lauterpacht, H., 'The Law of Nations and the Punishment of Law Crimes', (1944) 21 B.Y.I.L., 58
- Lauterpacht, International Law, Collected Papers, (1970) ed. E. Lauterpacht, Cambridge
- Lauterpacht,H., 'The Subject of the Law of Nations', (1947) 63 L.Q.R. 438; (1948) 64 L.Q.R., p.97
- Lawrence (Lord Oaksley), 'The Nuremberg Trial', Int. Aff., Vol. 23 (1947)
- Lawson,F. H., The Rational Strength of English Law, The Hamlyn Lectures, Third Series, Stevens & Sons

- Limited, London 1951
- Manning, Paul, Martin Bormann-Nazi in Exile, Lyle Stuart Inc., N.J., 1981
- Maugham, U.N.O. and War Crimes, John Murray, London, 1951
- Minear, R.H., Victors' Justice : The Tokyo War Crimes Trial, Princeton University Press, 1971.
- Molotov, V. M., The Molotov Notes on German Atrocities. Issued on behalf of the Embassy of the USSR in London, H.M. Stationery Office, 1952
- Morgan, The Great Assize, John Murray, London, 1948
- Mullins, The Leipzig Trials, H. F. and G. Witherby, London, 1921
- Neave, Lt. Col., Nuremberg: A Personal Record of the trial of the Major Nazi War Criminals in 1945-6, Hodder and Stoughton, London, 1978
- Oppenheim, International Law, 7th Edn., edited by Lauterpacht, 1952, vol. II, pp. 552-553. And see *ibid.*, pp. 602-604.
- Padfield, The Last Fuhrer, first published in Great Britain by Victor Gollancz, 1984, p. 454.
- Piccigallo, The Japanese on Trial, Texas, University of Texas Press, 1979
- Pollock, The Expansion of the Common Law, Rothman Reprints Inc., New Jersey, 1974, pp. 119
- Pompe, Aggressive War and International Crime, Martinus Nijhoff, The Hague, 1953
- Rauschning, Hitler Speaks, Thornton Butterworth Ltd., London, 1939,
- Robinson, Nehemiah, The Genocide Convention: A Commentary, Institute of Jewish Affairs, World Jewish Congress, New York, 1960.
- Rogat, Dr. Y., The Eichmann Trial and the Rule of Law, Center for the Study of Democratic Institutions, Santa Barbara, California, U.S.A., 1962
- Sack, 'Punishment of War Criminals and the Defence of Superior Order', (1944) 60 L.Q.R. 63
- Schlochauer, H., Yalta Conference (1945) E.P.I.L., vol. 4, 358
- Schwarzenberger, 'The Problem of an International Criminal Law' (1950) 3 Current Legal Prob., p. 293
- Schwarzenberger, International Law, Vol. II, Stevens & Sons Limited, London, 1968
- Smith, Reaching Judgement and Nuremberg, Basic Books Inc., New York, 1977
- Speer, A., Inside the Third Reich, Bonanza Books, New York, 1982 edn.
- Stimson, 'The Nuremberg Trial: Landmark in Law' (1947) 25 Foreign Affairs, No. 2, 179
- Stone, Legal Controls of International Conflict, Maitland Publications Pty. Ltd., Sydney, 1954, (second edn. 1959)
- Taylor, 'Robert H. Jackson and the Nuremberg Trials', (1955) 55 Columbia Law Review, pp. 488
- Taylor, L., A Trial of Generals, Icarus Press, Indiana, 1981
- Tutorow, War Crimes, War Criminals, and War Crimes Trials, Greenwood Press., New York, 1986

Westlake, Collected Papers, Cambridge University Press, edited by Oppenheim, 1914, vol. I, p.78.

Woetzel, The Nuremberg Trials in International Law, Stevens & Sons Limited, London, 1962

Wright, 'Legal Positivism and the Nuremberg Judgment', (1948) 42 AJIL, p. 405.

Wright, 'The Law of the Nuremberg Trial', (1947) 41 AJIL, pp.3839.

## GOVERNMENT AND OFFICIAL REPORTS

Activities of the Far Eastern Commission, Report by the Secretary General, U.S. Department of State Publication, 2888, Far Eastern Series 24, 1947,

American Draft of Definitive Proposal, International Conference, San Francisco, 1945

Australian War Crimes Board of Inquiry, Report, Vol. 1, House of Representatives Record 5624 (part 1), 1946

Diaries of Henry L. Stimson, 25th August, 1944, vol. 48, Yale University, U.S.A.

Eichmann Interrogated, transcripts from the archives of Israeli Police, ed. Jochen von Lang, Great Britain, 1983

External Affairs, Current Notes on International Affairs, 1945

Foreign Relations of the United States, Diplomatic Papers, 1943, vol. 1, General, United States Government Printing Office, Washington

G.A. Resolution 36/106, 10 December 1981, Official Records of the General Assembly, Thirty-Sixth Session, Supplement No. 46 (A/36/46) *various ones of these are cited*

GDR Committee for Human Rights, Bulletin I/85, Liberation--Peace--Self-determination. Article by Karl-Heinz Borchert

General Report of Commission of Jurists to Consider and Report upon the Revision of Rules of Warfare, (1938) AJIL.

Glaser, (1970) Droit International Penal Conventionelle, p. 165.

Historical Survey of the Question of International Criminal Jurisdiction, United Nations- General Assembly, International Law Commission, New York, 1949

History of the United Nations War Crimes Commission and the Development of the Laws of War, His Majesty's Stationery Office, London, 1948

International Law Association (ILA), Report of the ILA Thirty Third Conference

Juridical review, Vol. LV1, No.1, April, 1944,P.40

Laws of the State of Israel, vol. 4 (5710-1949/50)

League Year by Year, 1938

National Socialism, U.S. State Department , U.S. Government Printing Office, 1943

Nazi Conspiracy and Aggression, Office of the United States Chief of Counsel for Prosecution Axis Criminality, United States Government Printing Office, Washington, 1946

Nazi Party Organisation Book, 4th ed., 1937

Nuremberg Trial, International Military Tribunal (I.M.T.) His Majesty's Stationery Office, London, Cmd.

Nuremberg Trials, War Crimes and International Law, (1949) No. 450 International Conciliation, Carnegie Endowment for International Peace, New York

Nuremberg: German Views of the War Trials ( Benton and Grimm, eds.) Southern Methodist University Press, Dallas, 1985

Official Gazette, Control Council, 20 November 1945, p.20 et seq.

Parliamentary Debates, House of Lords, vol. 124, No. 86, col. 563

Reports on the Punishment of War Criminals, London International Assembly, London, 1943

Revue du Droit International, 1920, vol. 8

The 1970 Turner Memorial Lecture, entitled 'J.V. Barry: A Memoir', delivered Hobart, Tasmania.

The Charter and Judgment of the Nuremberg Tribunal. History and Analysis, memorandum submitted by the Secretary General, United Nations General Assembly, International Law Commission, New York, 1949

The Morgenthau Diary (Germany), 2

The Nuremberg Trial: Landmark in Law, (1947) Foreign Affairs, vol. 25, No.2

The Tokyo War Crimes Trial, Pritchard and Zaide (eds.) 22 vols., (1981) Garland Publishing Inc., New York and London

The Tokyo War Crimes Trial. An International Symposium, Edited by C. Hosoya, N. Ando, Y. Onuma, and R. Minear

The Work of the International Law Commission, 3rd Edn., United Nations, New York, 1980

U.N.O., 35th plenary meeting, Verbatim Record of the General Assembly, pp. 699-700.

U.S. Congressional Record (daily), vol. 91, No.156 (Sept. 6, 1945) reproduced in (1945) 39 A.J.I.L., Supp., pp.264-265

U.S. Department of State Bulletin, vol. xiii, No.318, 29 July, 1945, pp.

United Nations Document, Report of the Secretary General on the Work of the Organisation, New York, 7 September, 1982

Yearbook of the United Nations, 1974, vol. 19

## NEWSPAPERS

Frankfurter Zeitung, 26 September, 1931

National Socialist Monthly, May, 1932

Sddeutsche Juristen-Zeitung (July, 1948), vol.III, No. &. cols. 353-68

The Manchester Guardian, 30 August 1943

The Times, London, 12 November 1940

The Times, London, 20 November 1940

The Times, London, 2 August, 1951

'Note on the Nuremberg Trials', (1946) 62 L.Q.R., pp. 229-233.  
( 'Note on the Nuremberg Trials' by an unidentified writer).